Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. and AMERICAN CIVIL LIBERTIES UNION,
Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ALLIANCE FOR COMMUNITY MEDIA, *et al.*,
Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

CHARLES S. SIMS*
PETER J.W. SHERWIN
Proskauer Rose Goetz
& Mendelsohn LLP
1585 Broadway
New York, New York 10036
(212) 969-3000
Counsel for Petitioners in No. 95-124

I. MICHAEL GREENBERGER*
Shea & Gardner
1800 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 828-2000
Counsel for Petitioners Alliance for Community Media, Alliance for Communications Democracy, and People For the American Way in No. 95-227

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Respondents

* *Counsel of Record*

(Counsel continued on inside front cover)

PETITIONS FOR CERTIORARI FILED JULY 21, 1995 AND AUGUST 9, 1995
CERTIORARI GRANTED NOVEMBER 13, 1995

102 pp

STEVEN R. SHAPIRO
MARJORIE HEINS
American Civil Liberties
Union Foundation
132 West 43d Street
New York, New York 10036
Counsel for Petitioners
in No. 95-124

THOMAS J. MIKULA
MICHAEL K. ISENMAN
DAVID B. GOODHAND
Shea & Gardner
1800 Massachusetts Ave., NW
Washington, D.C. 20036
Counsel for Petitioners
Alliance for Community Media,
Alliance for Communications
Democracy, and People For the
American Way in No. 95-227

JAMES N. HORWOOD
Spiegel & McDiarmid
1350 New York Ave., NW
Washington, D.C. 20005
Counsel for Petitioners
Alliance for Community Media
and Alliance for Communications
Democracy in No. 95-227

ANDREW JAY SCHWARTZMAN
GIGI SOHN
Media Access Project
2000 M Street, NW
Washington, D.C. 20036

ELLIOT MINCBERG
LAWRENCE OTTINGER
People For the American Way
2000 M Street, NW
Washington, D.C. 20036
Counsel for Petitioners
People For the American Way
in No. 95-227

ROBERT T. PERRY
509-12th Street, Apt. 2C
Brooklyn, New York 11215
Counsel for Petitioners
New York Citizens Committee for
Responsible Media, Media Access
New York, Brooklyn Producers'
Group, and David Channon in
No. 95-227

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS

Page

Opinions, Orders, and Parts of the Record Omitted from the Joint Appendix v

Relevant Docket Entries vi

Comments of Acton Corp., Allen's Television Cable Service, Inc., Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Helicon Corp., Jones Intercable, Inc. KBLCOM Inc., Monmouth Cablevision Assoc., TeleCable Corporation, Texas Cable TV Association, United Video Cablevision, Inc., and West Virginia Cable Television Association 1

Joint Comments of Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People For the American Way. 4

Exhibit A: Patricia Aufderheide, *Cable Television and the Public Interest*, 42 J. COMM. 52 (1992) 55

Exhibit L: Patricia Aufderheide, *Public Access Cable Programming, Controversial Speech, and Free Expression* (Dec. 1992) 61

Exhibit M: Affidavit of Joseph J. Collins submitted in *Time Warner Entertainment Co. v. FCC*, No. 92-2494 (D.D.C.) 74

Exhibit N: Letter from InterMedia Partners to Tucson Community Cable Corp. of Nov. 13, 1992 77

Exhibit O: Customer Handbook, Jerrold IMPULSE 7000, Model DP71**, DPV72** and DPBB73** Addressable Converters 79

Exhibit P: Customer Handbook, Jerrold STARCOM VI Model DPV5-* Addressable Converter with Volume Control 117

Exhibit Q: Customer Handbook, Jerrold STARCOM 7 Model DQN7-* Digital Plain Converter 133

Comments of Ann Arbor Community Access Television . . . 155

Joint Comments of Blade Communications, Inc., Multivision Cable TV Corp., Parcable, Inc., Providence Journal Company, and Sammons Communications, Inc. 157

Comments of the Boston Community Access and Programming Foundation 162

Comments of Roxie Lee Cole, Citizen 170

Comments of Columbus Community Cable Access, Inc. (ACTV 21) 172

Comments of the Community Antenna Television Association, Inc. 174

Comments of Continental Cablevision, Inc. 181

Comments of Cox Cable Communications, a Division of Cox Communications, Inc. 196

Comments of Denver Area Educational Telecommunications Consortium, Inc. on Notice of Proposed Rule Making . 199

Appendix A: Articles Concerning CamNet 211

Mark Robichaux, *Camcorders Spark Two Cable Ventures*, WALL ST. J., July 30, 1992 at B1 . . . 212

Steve Weinstein, *A Cable Network About the Real World*, L.A. TIMES, Oct. 16, 1992 at F24 216

Joe Rhodes, *Video: Power to the People*, TV GUIDE, Nov. 28, 1992 at 19 220

MEDIA (excerpt) 221

Appendix B: Program Segments Carried by The 90's Channel Dealing with Sexuality 224

Comments of InterMedia Partners 226

Comments of Manhattan Neighborhood Network 235

Comments of the National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, and the National Association of Counties 239

Comments of National Cable Television Association, Inc. . . 244

Comments of Tele-Communications Inc. 246

Comments of Time Warner Entertainment Company, L.P. . 249

Comments of Virginia B. Bogue and Amy Lerom, Citizens of Tampa, Florida to Proposed Rule Making 271

Comments of City of Tampa Office of Cable Communication on Proposed Rule Making 275

Joint Reply Comments of the Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People For the American Way. 281

Appendix A 301

Linda Haugsted, *Warner, Access Group in Shootout*, MULTICHANNEL NEWS, May 20, 1992 at 1, 56 . 302

Linda Haugsted, *Warner Cable Up for Renewal*, MULTICHANNEL NEWS, July 22, 1991 at 14 . . . 305

System Notes, MULTICHANNEL NEWS, October 13, 1986 at 43 307

Appendix B 308

Jerry Adler, *Was It Good for You, Too*, NEWSWEEK, Feb. 24, 1992 at 63 309

Reply Comments of Cambridge Community Television . . . 311

Reply Comments of Cincinnati Community Video, Inc. . . . 316

Reply Comments of the City of St. Paul 318

Reply Comments of Columbus Community Cable Access, Inc. (ACTV 21) 327

Reply Comments of the Denver Area Educational Telecommunications Consortium, Inc. on Notice of Proposed Rule Making 330

Reply Comments of the Motion Picture Association of America, Inc. 333

Reply Comments of the National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, and the National Association of Counties 342

Reply Comments of the National Cable Television Association 349

Reply Comments of ʻŌlelo: The Corporation for Community Television 351

Reply Comments of Viacom International Inc. 353

Comments of New York Citizens Committee for Responsible Media 358

Exhibit D 369

TV GUIDE Manhattan Cable TV Edition, Dec. 12, 1992 370

Petition for Reconsideration of the NYNEX Telephone Companies 375

Opposition of Time Warner Entertainment Company, L.P. to the Petition for Reconsideration of the NYNEX Telephone Companies 379

Reply of the NYNEX Telephone Companies to Comments Opposing their Petition for Reconsideration 382

Declaration of John B. Schwartz 388

The following opinions, orders, and parts of the record have been omitted from this joint appendix because they were reproduced in full without deletion at the following pages as appendices to the printed petition for writ of certiorari in No. 95-124:

First Report and Order in the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992 . . . . . 128a

Second Report and Order in the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992 . . . . . 178a

Panel Opinion of the Court of Appeals for the District of Columbia Circuit 90a

In Banc *Per Curiam* Order of the Court of Appeals for the District of Columbia Circuit Vacating the Panel Opinion 89a

In Banc Opinion of the Court of Appeals for the District of Columbia Circuit 2a

In Banc *Per Curiam* Order of the Court of Appeals for the District of Columbia Circuit Staying the Issuance of the Mandate 1a

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 93-1169, 93-1171, 93-1270, 93-1276

February 22, 1993	Petitions for review filed in nos. 93-1169 and 93-1171.
April 7, 1993	Stay of First Report and Order granted.
April 15, 1993	Petition for review filed in no. 93-1270.
April 20, 1993	Petition for review filed in no. 93-1276.
May 7, 1993	Stay of Second Report and Order granted.
November 23, 1993	Opinion and judgment filed.
February 16, 1994	Suggestion for rehearing in banc granted and judgment vacated.
June 6, 1995	In banc opinion and judgment filed.
July 10, 1995	Stay of issuance of mandate granted.

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

Implementation of Section 10 of the Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-258
Indecent Programming and Other Types of Materials on Cable Access Channels	)	

COMMENTS OF ACTON CORP. ET AL.

* * *

I. The Commission Must Clarify That Voluntary Prohibitions On Leased Access Programming Are Based On The Exercise Of The Operator's Editorial Judgment And That Operators May Fashion Appropriate Individual Policies

The first provision of Section 10 authorizes cable operators to impose certain voluntary restrictions on leased access programming. The *Notice of Proposed Rulemaking* ("*NPRM*") suggests this area is self-executing and requires no Commission action. But the Commission could greatly advance the public interest by taking this opportunity to clarify the statutory language in furtherance of Congress' underlying objectives.

There are several critical points that the Commission should expand upon. First, the statute wisely provides that any decision about the carriage of "offensive" programming is to be made on the basis of the operator's "judgment." The critical question is *not* whether a particular program *is* "obscene . . . lewd, lascivious, filthy, or indecent or otherwise unprotected by the Constitution of

the United States," but whether the cable operator *believes* the programming falls into that category.

* * *

Despite the concerns underlying Section 10, most cable operators carry relatively little indecent programming on leased access channels. Although the statute talks about a single blocked "channel," the Commission should clarify that so long as the offensive programming is blocked, the channel need not be blocked on a 24 hour per day basis. Rather than devote an entire channel for this purpose, an operator might chose to maintain a single leased access channel and simply scramble the "indecent" portions of the programming to every subscriber who has not affirmatively requested it. We submit this approach is entirely consistent with Section 10(b), and enhances utilization limited channel capacity.

Finally, the Commission should make clear that the costs associated with establishing and maintaining a "blocked" channel should be borne by leased access providers of indecent programming. The Commission should incorporate that finding into its future rulemaking regarding reasonable rates, terms, and conditions for leased access use.

* * *

Respectfully submitted,
Acton Corp.
Allen's Television Cable Service, Inc.
Cable Television Association of
Maryland, Delaware and District
of Columbia
Century Communications Corp.
Columbia International, Inc.
Florida Cable Television Association
Gilmer Cable Television Company,
Inc.
Helicon Corp.
Jones Intercable, Inc.
KBLCOM Inc.
Monmouth Cablevision Assoc.

TeleCable Corporation
Texas Cable TV Association
United Video Cablevision, Inc.
West Virginia Cable Television
Association

By /s/
Paul Glist
Steven J. Horvitz
Susan Whelan Westfall
COLE, RAYWID &
BRAVERMAN
1919 Pennslyvania Ave., NW
Suite 200
Washington, DC 20006
202/659-9750

December 7, 1992

Attachments Omitted

Cover Omitted

Table of Contents Omitted

FCC Caption Omitted

JOINT COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA, THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY, THE AMERICAN CIVIL LIBERTIES UNION AND PEOPLE FOR THE AMERICAN WAY

These comments are being jointly filed by The Alliance for Community Media (formerly the National Federation of Local Cable Programmers), The Alliance for Communications Democracy, The American Civil Liberties Union, and People for the American Way. These four non-profit corporations represent organizations and individuals who use public, educational or governmental ("PEG") and leased access channels either as programmers or as viewers, Their comments are submitted in response to the Notice of Proposed Rulemaking adopted by the Commission on November 5, 1992 and released on November 10, 1992, whereby the Commission proposes to promulgate a rule pursuant to Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). The Commission's Proposed Rule is contained in Appendix A of its Notice. It would place restrictions on PEG programming that contains "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." It would also

place restrictions on allegedly "indecent" programming on leased access channels.

BACKGROUND

These commenters fully support the goal that apparently underlies Section 10 and the Commission's Proposed Rule — the protection of minors from cable programming that their parents find unsuitable for children. However, for a variety of reasons, we cannot support the regulatory mechanism chosen by Congress and the Commission. Before stating our objections, we place Section 10 and the Commission's Proposed Rule in context.

A. The 1984 Act. — The Cable Communications Policy Act of 1984 ("the 1984 Act") added Title VI to the Communications Act of 1934. As Congress's first direct legislation concerning cable, the 1984 Act was in part concerned with deregulating cable rates, which was thought necessary to encourage prosperity in an emerging industry. See generally H.R. Rep. No. 628, 102d Cong., 2d Sess. 28-29 (1992).

At the same time, Congress was equally concerned with preventing local cable operators from exercising sole programming choice. These operators are often owned by media conglomerates that also have ownership interests in the programmers chosen by their cable subsidiaries. Even when programmer ownership is not an issue, "cable conglomerates have shown themselves to be capable of using their dominant position in electronic media distribution to obtain economic advantages from those program channels they agree to deliver, and to allow these financial considerations to dictate which particular communication options to offer the public they ostensibly serve." Don R. LeDuc, *"Unbundling" the Channels: A Functional Approach to Cable TV Legal Analysis*, 41 Fed. Comm. L.J. 1, 8 (1988).

To that end, Congress incorporated into the 1984 Act leased access provisions that require a cable operator to "designate channel capacity for commercial use by persons unaffiliated with the operator." 47 U.S.C. § 532(b)(1). This legislation specified that "[a] cable operator shall not exercise any editorial control over any video programming provided" over leased access channels. 47

U.S.C. § 532(c)(2). According to the legislative history of that Act,

> "A requirement that channels be set aside for third-party commercial access separates editorial control over a limited number of cable channels from the ownership of the cable system itself. Such a requirement is fundamental to the goal of providing subscribers with the diversity of information sources intended by the First Amendment." H.R. Rep. No. 934, 98th Cong., 2d Sess. 31 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4668.

Congress was not only worried about financial disincentives. Leased access was also viewed as a way to insure subscribers "programming which represents a social or political viewpoint that a cable operator does not wish to disseminate." *Id.* at 48, 1984 U.S.C.C.A.N. at 4685.

The 1984 Act also included provisions that allow local franchising authorities to establish PEG access channels. By then, PEG had a long history of having been incorporated by local authorities into their franchise agreements. The earliest public access channels had appeared in the early 1960's, see Daniel L. Brenner *et al.*, *Cable Television and Other Nonbroadcast Video* § 6.04[2], at 6-32 (1992), and by 1969 the Commission had issued an order in part "encouraging" PEG, FCC 69-1170, 20 F.C.C.2d 201, 206-07 (1969). The 1984 Act thus did not create PEG; rather, it ratified the efforts in this area by localities across the country, and it assured other franchising authorities of their ability to require PEG channels in their franchise agreements.

PEG, as is true of leased access, addresses the bottlenecking that occurs when operators impede subscriber access to the full variety of cable programming, whether out of commercial concerns or hostility to diverse programming. Congress therefore specified that "a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity." 47 U.S.C. § 531(e). In doing so, Congress purposefully recognized that PEG was a public forum:

> "Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas." H.R. Rep. No. 934, *supra*, at 30, 1984 U.S.C.C.A.N. at 4667.

While thus seeking to assure the greatest diversity of cable programs, the 1984 Act was also concerned with protecting unsupervised children from all types of cable programming — be it on general or access channels — that their parents found unsuitable. Congress therefore enacted a "lockbox" provision, now codified at 47 U.S.C. § 544(d)(2)(A), which requires all cable operators to make lockboxes available to their subscribers. According to the legislative history of the 1984 Act, Congress

> "recognize[d] with respect to cable the need to provide for the restriction, within constitutionally permissible grounds, on the availability of programming, which might not be obscene, but is nonetheless indecent, if children are going to be adequately protected from exposure to such material. Thus, [47 U.S.C. § 544(d)(2)(A)] provides one method for dealing with obscene or indecent programming by requiring every cable operator to provide to any subscriber upon request a device (often referred to as a 'lock box') which is capable of restricting the viewing, during any period selected by the subscriber, of a cable service which contains obscene or indecent programming. The Committee believes that the requirement that these devices be furnished (by sale or lease) by the cable operator provides one means to effectively restrict the availability of such programming, particularly with respect to child viewers, without infringing the First Amendment rights of the cable operator, the cable programmer, or other cable viewers." *Id.* at 70, 1984 U.S.C.C.A.N. at 4707.

Thus, in 1984, Congress specifically accounted for the first amendment rights of programmers and viewers when it adopted lockboxes as the least restrictive means for effectively protecting children. Pursuant to court order, see *ACLU v. FCC*, 823 F.2d

1554, 1579 (D.C. Cir. 1987). *cert. denied*, 485 U.S. 959 (1988), the Commission has subsequently required that lockboxes be capable of blocking all channels carried on a cable system, including PEG and leased access channels. See FCC 87-306, 2 F.C.C.R. 5893, ¶ 9, at 5894 (1987).

B. PEG and Leased Access.[1] — PEG access channels have by any measure abundantly fulfilled the hope that they would become a robust "electronic marketplace of ideas" in those communities where they are provided for and supported with adequate resources.[2] First, PEG programming is a widely diverse mix from numerous sources. Some 2,000 centers produce about 10,000 hours of local programming a week. *Cable Television Regulation (Part 2), 1990: Hearings on H.R. 4415 Before the U.S. House of Representatives Subcomm. on Telecommunications and Finance of the Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (1990) (testimony of Sharon Ingraham, on behalf of the National Federation of Local Cable Programmers). An annual video festival known as the Hometown USA Video Festival is dedicated to showcasing the best of local origination and PEG channel productions, and in 1990 it attracted 2,100 entries from 360 cities in 41 states. Patricia Aufderheide, *Cable Television and the Public Interest*, 42 J. Comm. 52, 58 (1992) [hereinafter *Cable Television*] (App., Exh. A).

Second, access channels are widely viewed in those communities where they are available. Approximately 30 million

---

[1] The description that follows is based in very large measure on Patricia Aufderheide, *Cable Television and the Public Interest*, 42 J. Comm. 52, 58-60 (1992), which is included in the Appendix that is presented with these comments (hereafter, "App.") as Exhibit A. Dr. Aufderheide teaches in the School of Communication at The American University of Washington, D.C., and greatly assisted in the preparation of these comments.

[2] The robust quality of access programming has attracted a great deal of press attention. See App., Exh. B & C (examples of articles). Indeed, cable operators have often touted access channels when trumpeting the public good furthered by their systems. See App., Exh. D-G.

homes or 70 million people are provided with an access channel on their cable system. Margie Nicholson, *Cable Access: A Community Communications Resource for Nonprofits*, Bull. 3 (Benton Found., Washington, D.C.), Apr. 1990, at 7 [hereinafter *Cable Access*].

> "One multisite study shows that 47% of cable viewers watch community access channels, a quarter of them at least three times in two weeks; 46% say it was "somewhat" to "very" important in deciding to subscribe to or remain with cable. [Frank Jamison, *Community Programming Viewership Study Composite Profile* (1987) (App., Exh. H).] Another study, commissioned by Access Sacramento, showed that two-thirds of cable subscribers who knew about the channel watched it. [Access Sacramento, *1991 Audience Survey Findings Report* (1991) (App., Exh. I).]" *Cable Television, supra*, at 58.

Similarly, Northwest Community Television found that 50% of subscribers who could receive their programming watched it "frequent[ly]" or "occasional[ly]," and 46% rated this programming "very valuable" or "somewhat valuable." William Morris, *Northwest Community Television Subscriber Study* (1992) (App., Exh. J).

Finally, PEG programming speaks to a multitude of vital local issues. Government and educational channels may feature such programming as city council and school board meetings, local sports events, religious programming or a videotext community billboard. *Cable Television, supra*, at 59. Colleges use access channels not only to teach classes, but also to present more specialized studies, such as an examination of the immigrant experience through oral histories. Diana Agosta *et al.*, *The Participate Report: A Case Study of Public Access Cable Television in New York State* 45, 53 (1990) (App., Exh. K). Voluntary associations also use public access, including, for instance, the Humane Society in Fayetteville, Arkansas, which promoted its adopt-a-pet program, *Cable Access, supra*, at 13, and the Animal Rights Kinship of Austin, Texas, which produces the "ARK Forum" on animal and environmental rights, a program that promotes its low cost spay/neuter program, *id.* at 51. A musical

education series is sponsored by the Los Angeles Jazz Society. *Id.* at 39.

Moreover, PEG access channels are often the forum for core political debate. The Wrightwood Improvement Association of Chicago, for instance, used public access to marshal support for a "home equity" referendum. *Id.* at 30. In Tampa, Florida, public access cable provided the primary informational vehicle for citizens concerned about a county tax that was defeated in a record voter turnout. *Cable Television*, *supra*, at 59. "Also in Tampa, the educational cable access system's airing of school board meetings has resulted in vastly increased public contact with school board members." *Id.* at 59. In New York City, Paper Tiger television regularly produces programs that are sharply critical of the media. *Id.* at 60-61.

Austin, Texas, is home of one of access cable's oldest public affairs talk shows. *Cable Television*, *supra*, at 60. The League of Women Voters of Bucks County, Pennsylvania produces the ongoing video documentary series, "AT ISSUE." *Cable Access*, *supra*, at 57. Public access has also been host to viewpoints as diverse as those of leftist critics of the Gulf War (in Deep Dish TV's national series) and those of conservative Rep. Newt Gingrich (R-GA), who hosted half-hour shows produced by the Washington, DC-based American Citizen's Television (ACTV). *Cable Television*, *supra*, at 60-61.

Given the vital role that PEG has assumed, it is not surprising to find that its programming is at times controversial. For example, the Ku Klux Klan has circulated national programs for local viewing. George H. Shapiro, *Litigation Concerning Challenges to the Franchise Process, Programming and Access Channel Requirements, and Franchise Fees, in 1 Cable Television Law 1990: Revisiting the Cable Act* 341, § III, ¶ F., at 409 (Frank W. Lloyd ed. 1990). In the spirit of robust debate that is appropriate to an open electronic marketplace of ideas, the Klan programs spurred civil liberty and ethnic minority organizations to use the access service in response, which these groups have continued to do. Daniel L. Brenner, *supra*, § 604[7]. at 6-42.2 (1992).

Leased access has not to date been as successful as PEG. Cable operators have exercised their market power to price leased access out of the range of most programmers, as the Senate recognized in the legislative history of the 1992 Act:

> "The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer. For example, the operator may believe that the programmer might compete with programming that the [operator] owns or controls. To permit the operator to establish the leased access rate thus makes little sense." S. Rep. No. 92, 102d Cong., 1st Sess. 31 (1991).

Congress thus found that leased access was undermined by the system of operator-established rates that existed from 1984 until passage of the 1992 Act.

C. The 1992 Act. — During the period of federally mandated rate deregulation ushered in by the 1984 Act, the cable industry experienced tremendous growth. In the seven years following passage of the 1984 Act, cable penetration increased from thirty-seven to sixty-one percent of television households; monthly revenue increased from $18.94 to $31.51 per subscriber; and advertising revenue increased from $600 million to $3 billion. H.R. Rep. No. 628, *supra*, at 29.

Cable's growth spurred renewed congressional scrutiny of the industry. Since the beginning of October 1989, for example, the Senate Committee on Commerce, Science, and Transportation held eleven hearings on cable television. S. Rep. No. 92, *supra*, at 3. This oversight culminated in 1992 when Congress overrode a presidential veto and enacted the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Act" or "the Act").

Neither of the bills that originated the 1992 Act contained any provision that even remotely resembles what is now Section 10.

Rather, both bills, as well as the hearings and committee reports on each of them, where predominantly concerned with issues related to rate re-regulation, local "must carry" rules, customer service practices, and industry integration and concentration. See S. Rep. No. 92, *supra*; H.R. Rep. No. 628, *supra*.

Portions of the original bills did evince a concern for leased access. Thus, what is now Section 9 of the Act strengthens leased access by introducing rate regulation for those channels, under which the Commission must establish maximum reasonable rates and reasonable terms and conditions for carriage. As the legislative history of this provision discloses, rate regulation is expected to "increas[e] certainty and the use of these channels." S. Rep. No. 92, *supra*, at 32. Similarly, by encouraging the use of leased access by "programming source[s] which devote[ ] substantially all of [their] programming to coverage of minority viewpoints, or to programming directed at members of minority groups," Section 9(c) of the 1992 Act further "assure[s] that the widest possible diversity of information sources are made available to the public," S. Rep. No. 92, *supra*, at 29 (citation omitted).

D. Pertinent Amendments in the 1992 Act. — After both houses held hearings and issued reports concerning the bills that were to become the 1992 Act, those bills were modified by two amendments directed at controlling the content of cablecasts that were sexually explicit or otherwise deemed to be objectionable. First, both the House and Senate bills were modified by what was to become Section 15 of the Act. 138 Cong. Rec. § 589 (daily ed. Jan. 29, 1992); *id.* at H6528-30 (daily ed. July 23, 1992). This provision is entitled "Notice to Cable Subscribers of Unsolicited Sexually Explicit Programs." It requires a cable operator to notify subscribers at least thirty days before they are provided any "premium channel" — defined as a pay service that offers movies rated by the Motion Picture Association of America ("MPAA") X, R or NC-17 — as part of a free promotion. The subscriber may then request that the operator block the transmission of this channel to his home, and the operator must comply.

The legislative history of Section 15 discloses that the provisions of this amendment were purposefully crafted to be

similar to the subscriber-initiated lockbox requirement of 47 U.S.C. § 544(d)(2)(A), which the viewer can use to block programs on pre-existing channels. As the Senate sponsor recognized, under Section 15, "[t]he subscriber must call the cable company and ask that the channel be blocked or that the cable company provide a lockout device." 138 Cong. Rec. § 589 (daily ed. Jan. 29, 1992) (statement of Sen. Helms).[3]

The second such amendment was Section 10. In contrast to Section 15, Section 10 did not arise as an amendment in both houses of Congress. Rather, it was offered in three different parts as floor amendments on the last legislative day before the Senate approved its bill. Senator Helms first proposed subsections (a) and (b) with regard to leased access, *Id.* at § 646 (daily ed. Jan. 30, 1992). Senator Fowler immediately added subsection (c) for PEG. *Id.* at § 649. Some time later, Senator Helms added subsection (d) which abrogates statutory immunity for cable operators if they are found to have carried on PEG or leased access any program that "involves obscene material." *Id.* at S652. No provisions similar to any of Section 10's four subsections were introduced in the House.

Also in contrast to Section 15, Section 10's provisions are not even remotely analogous to lockboxes or any other system of subscriber-initiated blocking. Rather than relying on subscriber-initiated blocking, Section 10 allows an operator to prohibit even protected speech, without regard to whether subscribers want to see it or not. It therefore differs from a system of subscriber-initiated blocking, which allows parents to decide what (if any) programming to screen from their children.

For leased access, Section 10(a) allows cable operators to prohibit programming that the operator "reasonably believes" is

---

[3] We note that Section 15's system of subscriber-initiated blocking is problematic for a reason unrelated to the concerns of these Comments. Because the MPAA rating system does not provide the safeguards required by the first amendment, *Motion Picture Ass'n.*, v. *Specter*, 315 F. Supp. 824, 825 (E.D. Pa. 1970), government regulations may not rely upon it, *Swope* v. *Lubbers*, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983).

indecent. If the operator does not prohibit such programming on leased access channels, the operator is required by Section 10(b) to place all indecent programs (as defined by the Commission and self-identified by the programmer) on a single channel and to block that channel unless a subscriber requests access in writing. The Commission is required to promulgate leased access regulations within 120 days.

For PEG access, Section 10 follows a different approach. Section 10(c) requires the Commission to promulgate regulations within 180 days that will enable a cable operator to prohibit not just sexually explicit programming, but also "material soliciting or promoting unlawful conduct."

In the case of both PEG and leased access, Section 10(d) abrogates a statutory immunity and allows a cable programmer to be held liable if it carries any program that "involves obscene material." Liability may be imposed whether or not the operator has exercised the authority to prohibit programming given to it under subsections (a) and (c).

In sum, although Section 10 treats PEG and leased access differently, for both types of channels it allows an outright ban on purportedly offensive programming. Rather than directly instituting these bans, however, Section 10 follows a bifurcated approach. First, subsections (a) and (c) allow cable operators to ban the disfavored programming. Second, subsection (d) waives the statutory immunity otherwise available to those operators if they fail to ban programming that "involves obscene material."

Section 10 and its legislative history are remarkably void of any reference to the lockbox requirement of the 1984 Act, now codified at 47 U.S.C. § 544(d)(2)(4). The congressional record thus contains no legislative findings to support a conclusion that lockboxes have somehow become ineffective in achieving the interest of protecting minors. Rather, the portions of the bill that were enacted as Section 10 were introduced on the floor of the Senate without a committee report on their purpose, justification or likely effect. Even then, no Senator so much as purported to present a considered judgment with respect to how often or to what

extent minors were being exposed to cablecasts that their parents considered unsuitable, despite the lockbox requirement.

E. The Commission's Proposed Rule. — On November 5, 1992, the Commission instituted the instant docket in order to promulgate a rule under Section 10. Appendix A of its Notice of Proposed Rule Making presents the Commission's Proposed Rule, which is intended to implement Section 10. In large measure, the commission's proposed Rule merely reiterates the provisions of Section 10's first three subsections, but it omits any construction of subsection (d)'s imposition of liability.

The Commission's Proposed Rule is accompanied by a prefatory Notice that generally solicits suggestions for regulations not contained in the Proposed Rule. For example, with respect to the content-based regulation of PEG, it requests commenters to address "whether our regulations should provide for any additional matters not expressly addressed in the statute," and it "invite[s] interested persons to comment on these and any other aspects that they believe would be germane to proper implementation of this provision." Notice ¶ 14, at 7. See also *id.* ¶ 12, at 6 (similar language with respect to leased access). It also speaks in general terms about other possible regulations that are not a part of the Proposed Rule.

In contrast to the congressional record, the Commission's Notice does recognize that lockboxes remain an effective means to "control access to other cable services on the system or to limit access to [an unblocked leased access channel] to others in the household." Notice ¶ 9, at 5. It is nonetheless similar to the congressional record in that it, too, is void of either evidence or reason to support a conclusion that lockboxes have somehow become ineffective in achieving the interest of protecting minors from programming that their parents consider unsuitable for children.

SUMMARY

Because the first amendment commands that "Congress shall make no law . . . abridging the freedom of speech," the federal courts have held that the power to regulate "must be so exercised

as not, in attaining a permissible end, unduly to infringe on the protected freedom." *Cantwell* v. *Connecticut*, 310 U.S. 296, 304 (1940). Section 10 and the Commission's Proposed Rule violates this basic tenet, as we discuss in detail below.

As an initial matter, Section 10 does not escape first amendment scrutiny merely because the programming standards contained in subsections (a) and (c) are expressed in permissive terms. State action is implicated because this federal legislation impinges on locally-created PEG and leased access public fora. The leased access blocking requirements of subsection (b) also demonstrates direct state action. Additionally, the threat of liability contained in subsection (d) exercises coercive government power over the operator, thereby "convert[ing] its otherwise private conduct into state action." *Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1295 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988).

Even if the prohibitions allowed by Section 10 were not considered state action, they would still be subject to the first amendment, for they impinge on a public forum. Local franchising authorities have, with Congress's approval, "intentionally open[ed] a nontraditional forum for public discourse" and created a public forum for "the free exchange of ideas." *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 112 S. Ct. 2701, 2706 (1992). Even private restrictions on access channels are therefore subject to first amendment scrutiny.[4]

Under appropriate first amendment analysis, Section 10 is itself unconstitutional, for it fails the least restrictive means test. Federal law already requires cable operators to make lockboxes available, 47 U.S.C. § 544(d)(2)(A), and these have been recognized by the courts and the Commission as an effective and non-intrusive means of controlling the access of unsupervised children to programming

---

[4] *Missouri Knights of the Ku Klux Klan* v. *Kansas City, Mo.*, 723 F. Supp. 1347 (W.D. Mo. 1989).

that their parents find inappropriate.[5] Content-based restrictions are therefore unconstitutional.[6]

By largely reiterating the statute, the Commission has failed to propose constitutional regulations under Section 10. First, the Commission's Notice of Proposed Rulemaking is completely devoid of any consideration of less restrictive means. The ban it envisions on all sexually explicit and otherwise assertedly objectionable programming impermissibly reduces adults to viewing only those access programs that are suitable for a child. For that reason, such bans have always failed, even when advanced as a scheme to protect minors from television broadcasts.[7] Moreover, even if such a ban could be justified, it is unnecessarily restrictive in the case of cable. The Commission has often determined that the far less restrictive option of lockboxes sufficiently guards children from sexually explicit programming, and it has been supported in this determination by Congress and the courts. However, the Notice fails to offer a reason for the Commission's change in position, and no facts are presented on the record to support that change.

Second, because it is woefully underinclusive, the Proposed Rule cannot be justified as necessary to serve a compelling state interest. It mirrors the statute's concern for programming only on PEG and leased access channels, without preventing other sexually explicit or otherwise objectionable cablecasts from reaching the unsupervised children who are assertedly being protected. This is especially suspect because Congress has recognized the existence of other forms of sexually explicit cablecasts, but it has not given the

---

[5] *ACLU* v. *FCC*, 823 F.2d 1554, 1579 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); FCC 87-306, 2 F.C.C.R. 5893, ¶ 9, at 5894 (1987).

[6] See, *e.g.*, *Cruz* v. *Ferre*, 755 F.2d 1415, 1419 (11th Cir. 1985); *Community Television* v. *Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc.* v. *Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

[7] *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508-09 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281, *and cert. denied*, 112 S. Ct. 1282 (1992). See generally *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

Commission the power to impose similar restrictions on them. In the end, therefore, the Commission is constrained from effectively implementing the goal that purports to justify a content-based restriction on speech. Instead, its Proposed Rule burdens only those who speak on PEG and leased access channels — society's less powerful interests, including minorities, who otherwise have no access to the electronic media.

Third, even as a child protection measure, the standard for prohibiting PEG programming suffers from overbreadth. It is not limited to the "patently offensive" sexual material that constitutes indecency, and it prohibits "material soliciting or promoting unlawful conduct." The Commission itself has indicated that this standard must be narrowed, *see* Notice at 6 n.11, but it has not done so in the Proposed Rule, *see id.* App. A. In the same vein, the immunity waiver provision of Section 10(d) is overbroad because it subjects cable operators to liability for carrying not only obscene programs, but also those that "involve[ ]" obscenity. The Commission has similarly failed to use its interpretive powers to narrow this vague statutory provision.

Finally, the Commission has not proposed appropriate procedures for the prior imposition of these content-based restrictions on speech. Although not always invalid *per se*, content-based prior restraints must be accompanied by a highly protective system of judicial safeguards. Because the provision for imposing liability on cable operators is vague, it, too, should only be imposed after a court has previously found a program obscene. Such procedures are totally absent from the Proposed Rule, however.

The Commission has not exercised its interpretive power to narrowly construe Section 10 to avoid these constitutional deficiencies. Rather, it has at best indicated that such steps would be appropriate without incorporating corresponding regulatory language into the Proposed Rule. See, *e.g.*, Notice at 6 n.11 (suggesting basis for narrowing statutory prohibition standard for PEG access). Indeed, the Commission has indicated that it intends to incorporate a host of other measures into its Proposed Rule, but it has not delineated the breadth of those measures. see, *e.g.*, *id.* ¶ 14, at 7 ("Commenters should also address whether our

regulations should provide for any additional measures not expressly addressed in the statute."). In any circumstance, this rulemaking approach prejudices the public's right to comment on regulatory proposals. It should be especially disfavored in this situation, where core first amendment rights are threatened.

INTERESTS OF COMMENTERS

The Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union, and People for the American Way are non-profit corporations that represent organizations and individuals who use PEG and leased access channels both as programmers and as viewers. The comments that they jointly submit therefore reflect the unique shared perspective of organizations whose members have a direct interest in assuring that cable operators use the public rights of way in a manner consistent with the interests of the entire community.

The Alliance for Community Media (formerly the National Federation of Local Cable Programmers) is dedicated to both ensuring that people have access to cable and other electronic media and promoting community uses of such media. It is a national membership organization comprised of more than twelve-hundred organizations and individuals in more than seven-hundred communities, including volunteer access producers, access center managers and staff members, local cable advisory board members, city cable officials, cable company staff working in community programming, and others interested in local programming around the country. The Alliance for Community Media assists its members in all aspects of community programming over access channels, from production and operations to regulatory oversight.

The Alliance for Communications Democracy supports efforts to protect the rights of the public to speak via cable, and it promotes the availability of the widest possible diversity of information sources and services to the public. The Board of Directors of the organization is composed of representatives of

nonprofit access corporations in communities around the country,[8] who together have helped thousands of members of the public use the access channels that have been established in their communities.

The American Civil Liberties Union ("the ACLU") is a nationwide, nonpartisan organization with nearly 300,000 members, many of whom are viewers of PEG and leased access cable channels. It is dedicated to the protection and promotion of individual rights and liberties, primary among them freedom of speech. In 1990 the ACLU established an Arts Censorship Project specifically to combat an increased climate of censorship in the United States, including in particular efforts to suppress creative expression and information about sexuality and sexual orientation.

People for the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including first amendment freedoms. Founded in 1980 by a group of religious, civic and education leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. Many of People For's members subscribe to cable television and watch programs on PEG and leased access channels. People For's members have specific and personal interests in promoting the free flow of information and in receiving uncensored cable programming. People For seeks to protect the interests of its members, as well as the broader interest in preventing censorship of expression protected by the first amendment.

Although the commenters generally support the goal of protecting unsupervised children from cable programming that their parents find inappropriate, we cannot support the commission's Proposed Rule. The content-based restrictions that the Commission proposes will prove seriously disruptive to access programming and the value that it brings to local communities across the country.

---

[8] These communities include Chicago, Illinois; Montgomery County, Maryland; Boston, Massachusetts; Grand Rapids, Michigan; Manhattan and Staten Island, New York; Columbus, Ohio; Tucson, Arizona; and the State of Hawaii.

Moreover, the Proposed Rule will work this mischief without adding anything to the already effective requirement that cable operators provide lockboxes to protect unsupervised children.

First, the PEG restriction on "material soliciting or promoting unlawful conduct" presents special problems for programming that engages in core political speech.[9] For example, in Grand Rapids, Michigan, the producers of "Lies of Our Times" have endorsed sanctuary for Latin American refugees and encouraged blockades of government offices in protest of various official positions. Similarly, "The Flying Focus Video Collective" of Portland, Oregon has hosted a speaker who advocated direct and illegal action to protect old timber growth. Several programs have advocated the decriminalization of marijuana, including "Libertarian Conspiracy" of Sacramento, California, "Libertarian Review" and "Time for Hemp" in Tucson, Arizona, and "Cannabis" in Kalamazoo, Michigan. Patricia Aufderheide, *Public Access Cable Programming, Controversial Speech, and Free Expression*, 4-5 (Nov. 1992) [hereinafter *Public Access*] (App., Exh. L).

Second, the restriction on sexually explicit programming would curtail programming on health education and sex education, including programs that deal frankly with AIDS. This would include programming directed at both the gay minority and heterosexuals.

Examples of each of these types of programming are literally too extensive to document here. For example, Cambridge Community Television in Massachusetts could be faced with restrictions on a program entitled "Truth or Consequences: A Guide to Safe Sex at MIT." *Id.* at 4. So could Kalamazoo Community Access Center of Michigan for an AIDS prevention special that involved role-playing. *Id.* Similarly, the Northern Virginia Youth Services Coalition produces the weekly cable access series, "Focus

---

[9] The description that follows is based in very large measure on *Public Access Cable Programming, Controversial Speech and Free Expression*, a draft article by Dr. Aufderheide, that is included in the Appendix as Exhibit L.

on Youth." In one program on AIDS, two professionals role-playing a dating situation were asked, "If you were dating, how would you get your partner to reveal his sexual history?" *Cable Access*, *supra*, at 49.

A video of a home birth in Amherst, Massachusetts might have fallen under scrutiny, as might have "Desperately Seeking Susan," a program in Olympia, Washington that is hosted by a therapist and includes frank discussion of sexual behavior and sexual dysfunctions. *Public Access*, *supra*, at 4. The same is true for the "HealthVisions" series, produced by the community and professional education department of Good Samaritan Hospital and Medical Center of Portland, Oregon. Programs in the series have included "PMS: Breaking the Cycle" and "Understanding Impotence: A Common and Treatable Problem." *Cable Access*, *supra*, at 37.

Moreover, some programs would face restrictions under either or both of the "unlawful" and "explicit" standards. For example, access centers in Forest Park Ohio, Fort Wayne, Indiana, Sacramento, California, Kalamazoo, Michigan, and Portland, Oregon have aired programs, some produced by Operation Rescue, that have opposed abortion. Some of these programs have either encouraged blocking access to abortion clinics or have contained possibly offensive explicit images, or both. *Public Access*, *supra*, at 5.

Finally, live programming, including call-in programs, will be particularly hindered by the commission's proposed Rule. These shows fulfill a unique role by both making cable immediately interactive and allowing disparate minority groups to communicate with each other through that medium. It is in the nature of these programs to be unpredictable, however, especially when they concern sensitive or hotly-debated topics. Because programmers of these types of shows cannot assure operators of their content, the fear of liability is especially likely to prompt their prohibition.

Several shows concerning sex education could thus be hampered. For example, one segment of "AIDS Call-in Live," from Chicago, included a seventeen-year-old girl asking how to respond to a boyfriend who assured her that they did not need to

use condoms because he was loyal to her. Speakers may also hold up items such as condoms to explain their use. *Id.* at 8.

Health education shows could also have the same problems, For example, "Health in America" is produced monthly in Sacramento and discusses alternative and holistic health-care options. It has included graphic images of women with mastectomies and damaged breast implants. *Id.* at 8.

Finally, topical call-in programs would also be threatened. Sacramento aired "Live Wire" within hours of the Rodney King verdict, on which callers had their volatile moments. And access programs in Oregon hotly debated that state's ballot initiative that would have criminalized some homosexual behavior. *Id.* at 5, 8.

No one can dispute the value of these programs to an adult viewing audience. Even if some parents feel that unsupervised minors should not be given free access to all of them, it ill serves society to reduce adults to viewing cable that is only fit for children. For that reason, we see lockboxes as the alternative that is superior to allowing the prohibition of this type of programming. Lockboxes allow adults both to control children's access and to partake of the robust speech and debate being aired on access channels. They also allow parents to decide for themselves whether or not their children will benefit from receiving information on sensitive topics, and they allow access to be granted for just the space of one program. Bans and blocking schemes offer none of these advantages, yet the congressional record and the Commission's Notice both disclose that hardly a whisper of attention has been paid to the lockbox option.

I. SECTION 10 VIOLATES THE FIRST AMENDMENT

There can be little doubt that the purpose and effect of Section 10 of the Act is to establish a system of censorship that violates the first amendment rights of those who wish to cablecast on PEG and leased access channels and those who wish to view the censored programming. As such, if the Commission is to implement this section of the Act *in haec verba* (as its Proposed Rule suggests), any final rule that it may promulgate in these proceedings will itself be unconstitutional. We discuss the various constitutional

difficulties that the Commission's Proposed Rule presents in the sections that follow this one.

This section focuses on the statute itself, and our purpose is twofold. First, we demonstrate the propriety of applying first amendment analysis to the content-based restrictions on free expression that are either enshrined in Section 10 or called for by it. Second, we show that Section 10's regulation of non-obscene cable programming is necessarily unconstitutional.

A. STATE ACTION

As an initial matter, we are aware of certain statements in the floor debates concerning Section 10 that attempt to categorize the restrictions on speech contained in that enactment as non-governmental and hence beyond constitutional scrutiny. *See, e.g.*, 138 Cong. Rec. § 646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms); *id.* at § 648 (statements of Sen. Thurmond); *id.* at § 649 (statement of Sen. Inouye). In our view, these statements are clearly mistaken.[10] As a general matter, Congress' role in establishing this system of censorship (as well as that of the Commission in implementing it) involves sufficient government action to implicate the protections of the first amendment. Access channels are public fora that have been created by localities through contracts between franchising authorities and cable operators. Pursuant to these contracts, local cable operators are prohibited from censoring access programming. Through Section 10, Congress seeks to interfere with these contracts by authorizing censorship through its chosen agents, the cable operators.

Moreover, two features of this regulation demonstrate the state's ongoing involvement in the system of censorship that Section

[10] Other floor statements clearly indicate that sponsors of Section 10 impermissibly intended "to forbid cable companies" from allowing programmers to freely express themselves over PEG and leased access channels. 138 Cong. Rec. § 646 (daily ed. Jan. 30, 1992)(statement of Sen. Helms), See also *id.* at § 652 (imposition of liability on cable operators "will put an end to the kind of things going on" access channels).

10 establishes. First, Congress has specified that, in all instances, leased access programming must be blocked if it constitutes "indecent programming, as defined by Commission regulations." Section 10(b) (codified at 47 U.S.C. § 532(j)(1)). This provision is an integral part of Section 10's system of censorship, and it indicates that Congress has fully involved itself and the Commission in placing restrictions on programming under the Act. As such it is direct state involvement that suffices to trigger first amendment scrutiny of the entire enactment.[11] Further, Section 10(b) indicates that Congress viewed the censorship of cable programming as a function of the state, and its delegation of a part of that power to a private actor does not insulate the exercise of that power from constitutional scrutiny. See, *e.g.*, *Williams* v. *City of St. Louis*, 783 F.2d 114, 117 (8th Cir. 1986) ("This delegation under state law of powers possessed by virtue of state law and traditionally exercised by the City satisfies us that the City's action here is under color of state law."); *Ancata* v. *Prison Health Servs. Inc.*, 769 F.2d 700, 703 (11th Cir. 1985) ("Where a function which is traditionally the exclusive prerogative of the state . . . is performed by a private entity, state action is present.").

Second, it is Congress in all instances that has specified what type of programming an operator may refuse to carry over PEG or leased access, otherwise mandating that "a cable operator shall not exercise any editorial control" over the programming of these channels. 47 U.S.C. § 531(e) (PEG); 47 U.S.C. § 532(c)(2) (leased access). This congressional specification of programming standards is not insulated from first amendment scrutiny merely because it is phrased in permissive terms, for it operates in tandem with Section 10(d)'s imposition of liability on private censors if they fail to prohibit speech that "involves" obscenity. In other words, these provisions place the operator in peril of liability and prompt it to

[11] Because "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress," *Alaska Airlines. Inc.* v. *Brock*, 480 U.S. 678, 685 (1987) (emphasis in original), the state action that adheres in the blocking provisions of subsection (b) cannot be severed from the rest of the statute.

restrict any programming that even remotely meets the permissive censorship standards set out in subsections (a) and (c) of Section 10, lest the speech also wander into the undefined grey area that "involves obscene material." *Cf. Bantam Books, Inc.*, v. *Sullivan*, 372 U.S. 58, 67 (1963) (cautioning against elevating form over substance when determining whether censorship is occurring); *Penthouse Int'l. Ltd.* v. *McAuliffe*, 610 F.2d 1353, 1360 (5th Cir.) (same), *cert. dismissed*, 447 U.S. 931 (1980).

This effect has already been felt.[12] For example, as the Chairman and Chief Executive Officer of Time Warner Cable ("TWC") concluded in an affidavit that was submitted in litigation that brought a direct challenge to the 1992 Act:

> "The provision of Section 10(d) . . . injur[es] TWC by subjecting it to the risk of criminal and civil liability for programming created by others that it does not wish to carry but is required by law to carry. The provisions . . . of the Cable Act permitting TWC to prohibit or restrict obscene programming does not alleviate such injury in that they compel TWC to determine obscenity questions that even Federal courts regard as exceedingly difficult, and TWC remains exposed to criminal or civil liability if a court later disagrees with its determination." Affidavit of Joseph J. Collins, ¶ 37, at 23 (App., Exh. M).

---

[12] Of course, the threat of liability is sufficient for state action purposes; it need not be the case, as here, that such a threat has proven to be the direct cause of private conduct, *Peterson* v. *City of Greenville*, 373 U.S. 244, 248 (1963) (finding state action "even assuming . . . that the manager would have acted as he did independently of the existence of the ordinance"); *Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1295 (9th Cir. 1987) ("Simply by 'command[ing] a particular result,' the state had so involved itself that it could not claim the conduct had actually occurred as a result of private choice."), *cert. denied*, 485 U.S. 1029 (1988).

Cable operators thus feel compelled by their possible liability to censor widely.

Indeed, cable operators have for that reason already begun to institute censorship for programming that is sexually explicit but not even arguably indecent, out of fear that some such program might later be found to subject the operators to liability. As one cable operator wrote to the executive director of its local public access programmer,

> "all programming which contains sexual, excretory or other behavior or depictions, or language which potentially may be offensive to the citizens of Tucson [must] be sent to our system for screening *before* it is cablecast by TCCC over our cable system." Letter from InterMedia Partners to Tucson Community Cable Corp. (Nov. 13, 1992) (App., Exh. N).

Thus, not only is programming called in to question if it concerns sexual material of any nature, it is also subject to editorial scrutiny if it contains "potentially . . . offensive" language. Because of their unpredictable nature and potential to include such language, cable operators have specifically targeted live programming (including call-in shows):

> "Moreover, no live programming should be cablecast which contains such material. All such programming should be taped and sent to us for screening as outlined above." *Id.*

Recognizing the obvious dangers posed by the threat of government-imposed liability on private censors, federal courts faced with similar schemes have not hesitated to recognize the state action that brings first amendment principles to bear. For example, in *Carlin Communications, Inc.* v. *Mountain States Telephone & Telegraph Co.*, 827 F.2d 1291 (9th Cir. 1987). *cert. denied*, 485 U.S. 1029 (1988) Arizona's threat of criminal liability constituted sufficient state action to subject to first amendment scrutiny a telephone company's decision to bar sexually explicit messages. "With this threat, Arizona 'exercised coercive power' over Mountain Bell and thereby converted its otherwise private conduct into state action . . . ." *Id.* at 1295 (*quoting Blum* v. *Yaretsky*, 457

U.S. 991, 1004 (1982)).[13] Similarly, the threat of liability contained in Section 10(d) of the 1992 Act transforms the censorship standards of Sections 10(a) and (c), which are otherwise phrased in permissive terms, into state action.

Indeed, the existence of subsection (d) nullifies the state action arguments advanced in the floor debates on Section 10. Subsection (d) was not a part of the enactment then being debated, but was later added as a "conforming amendment." It is "conforming," however, only in the sense that it requires cable operators to conform to censorship standards that are otherwise phrased in permissive terms. In later proposing the addition of subsection (d), Senator Helms specifically stated that its purpose was to "put an end to the kind of things going on" access channels.[14] Given this change in circumstances, it is not surprising to find inapposite the federal cases cited in the floor debate for the proposition that the censorship being enacted would escape constitutional scrutiny. For example, Senator Helms pointed to *Carlin Communication. Inc.* v. *Southern Bell Telephone & Telegraph. Inc.*, 802 F.2d 1352 (11th Cir. 1986), to support his contention that "it is permissible to allow a private company to make *independent* decisions to exclude certain

---

[13] The court went on to hold that any decision to ban speech made under threat of state-imposed liability "was unconstitutional state action" that violated the first amendment. 827 F.2d at 1296.

[14] In its Notice of Proposed Rulemaking, the Commission recognized the symbiotic relationship between the programming standards of subsections (a) and (c) and the imposition of liability contained in subsection (d). For example, Paragraph 13 first notes that subsection (c) "merely allows the cable operator the option" of censoring PEG. The next sentence immediately juxtaposes

"As pointed out earlier, however, [subsection (d)] expressly provides that cable operators are no longer statutorily immune from liability for carriage of obscene materials on these channels."

However, we note that the legislative history of subsection (d) suggests that liability cannot be imposed on cable operators with respect to PEG. The scant floor debate was concerned wholly with leased access channels. 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992) (statement of Sen. Helms).

objectionable material." 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (emphasis added). As others have readily recognized, however, the threat of liability removes the independence of that decision and renders it subject to first amendment scrutiny. See, *e.g.*, *Mountain States*, 827 F.2d at 1295; *id.* at 1298 n.2 (Canby, J., dissenting in part) ("the presence of this coercion differentiates this case from *Carlin* v. *Southern Bell*").

B. PUBLIC FORUM

Even were the censorial dictates of Section 10 not themselves state action, the first amendment would still apply. Because PEG and leased access constitute a quintessential public forum, a system of censorship is not insulated from the first amendment simply because Congress has vested private cable operators with the decision to prohibit speech in that forum. When the government destroys a public forum by empowering private actors to restrict speech, it must do so within the bounds of the first amendment.

PEG and leased access certainly constitute such a public forum — one that is unique because of the widespread reliance on electronic communication. Congress recognized this status in the legislative history of the 1984 Act, which both recognized that local franchising authorities could provide for PEG in franchises and required them to establish leased access, See H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 (quoted *supra* page 4). The legislative history of the 1992 Act similarly recognizes that Congress has heretofore "requir[ed] cable operators to operate public and leased access channels as a public forum open to any and all speakers." 138 Cong. Rec. S648 (daily ed. Jan. 30, 1992) (letter from Mr. Peters); *id.* at S652 (statement of Sen. Helms) ("[T]he intent of the [1984] law, obviously, was to promote diversity in cable programming. The law required cable operators to carry anything that programmers brought along."). In sum, "the underlying theory of leased access channels [is] to provide a forum for people to speak out on a diversity of issues." *Id.* (statement of Sen. Thurmond). See also S. Rep. No. 381, 101st Cong., 2d Sess. 46 (1990) (PEG and leased access constitute "a free market of ideas").

Under generally applicable first amendment principles, therefore, localities that implement these provisions pursuant to their franchising authority have purposefully "'open[ed] a nontraditional forum for public discourse'" and created a public forum "that has as 'a principal purpose . . . the free exchange of ideas.'" *International Society for Krishna Consciousness, Inc.* v. *Lee* 112 S. Ct. 2701, 2706 (1992) (quoting *Cornelius* v. NAACP *Legal Defense & Educ. Fund. Inc.*, 473 U.S. 788, 800, 802 (1985))[15]. The federal courts have thus recognized that PEG and leased access constitutes a public forum for purposes of first amendment analysis.[16]

Because of the recognition that access channels are a public-forum, as at least one commentator has noted, "for the access channels, the 1984 Act regards the cable system as the modern counterpart to the city street or, perhaps more precisely, to the streets in a company town." Michael I. Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 Ga. L. Rev. 543, 585 (1985). Attempts by

---

[15] See also *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555 (1975) (finding municipal auditorium a public forum); *Cinevision Corp.* v. *City of Burbank*, 745 F.2d 560, 570 (9th Cir. 1984) (same for amphitheater), *cert. denied*, 471 U.S. 1054 (1985); *Yurkew* v. *Sinclair*, 495 F. Supp. 1248, 1252 n.5 (D. Minn. 1980) (state fair grounds); *United States Labor Party* v. *Knox*, 430 F. Supp. 1359, 1361-62 (D.N.C. 1977) (parking areas adjoining state-owned liquor stores).

[16] See, *eg.*, *Quincy Cable TV. Inc. v. FCC*, 768 F.2d 1434, 1452 (D.C. Cir. 1985) ("access rules . . . serve countervailing First Amendment values by providing a forum for [the] public"), *cert. denied*, 476 U.S. 1169 (1986); *Muir v. Alabama Educ. Television Comm'n*, 656 F.2d 1012, 1022 & n.19 (5th Cir. Unit B 1981); *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580, 598-600 (W.D. Pa. 1987) ("access requirements are intended to make cable channels available to the public on a first-come, first-served nondiscriminatory basis"). See also *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F. Supp. 976, 987 (D.R.I. 1983) (access rules "mandate that all individuals be given the opportunity to appear on cable television on a nondiscriminatory first-come, first-served basis"), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985).

private operators to now forbid expression upon channels that have previously been dedicated as a public forum are therefore subject to first amendment analysis, just as first amendment scrutiny is necessary when the private owner of a company town attempts to deny others the right to speak on nominally private sidewalks. *Marsh* v. *Alabama*, 326 U.S. 501, 507-08 (1946). "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* at 506. *Cf. International Society for Krishna Consciousness* v. *State Fair of Tex.*, 461 F. Supp. 719 (N.D. Tex. 1978) (enjoining restrictions placed by non-profit corporation on religious expression being pursued in a public forum).

In a situation remarkably similar to that presented by Section 10, it vas an access channel's status as a public forum that prompted a federal court to apply first amendment analysis to a scheme of permissive private censorship. *Missouri Knights of the Ku Klux Klan* v. *Kansas City, Mo.*, 723 F. Supp. 1347 (W.D. No. 1989). The *Kansas City* case arose after members of a racist organization declared their intention to air a program over a public access channel. In reaction, the city council passed an ordinance that "permitted [the local cable operator] to delete the cable channel if it so desired." *Id.* at 1350. In its stead, "a new channel would be created" that "would be subject to [the operator's] editorial control." *Id.* Recognizing that the introduction of permissive editorial control would have intruded upon a public forum, the court denied a motion for summary judgment that would have eliminated a first amendment claim. It held that "[a] state may only eliminate a designated public forum if it does so in a manner consistent with the First Amendment." *Id.* at 1352.[17] Because

---

[17] See also *United States* v. *Grace*, 461 U.S. 171, 180 (1983) ("the destruction of public forum status. . . is at least presumptively impermissible" under the first amendment). *Cf. United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981) ("Congress, no more than a suburban township, may not by its own *ipse*

(continued...)

Section 10 and the Commission's proposed regulations thereunder would similarly allow cable operators to impinge upon the PEG and leased access public forum, they are proper objects of scrutiny under the first amendment.

C. FIRST AMENDMENT VIOLATIONS

We have shown above that Section 10 does not escape first amendment scrutiny. Moreover, under standards applicable to content-based cable regulations, Section 10 is unconstitutional. As the Commission has recognized in this docket, see Notice ¶ 7, at 4, differences in the characteristics of the various print and electronic media mandate different standards of first amendment protection against content-based regulation of expression pursued over each such medium. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 386 (1969). "Each method of communicating ideas is a 'law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 501 (1981) (quoting *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (1949)). Attention to the peculiarities of each medium is therefore necessary when it comes to scrutinizing attempted government regulation of speech that, while not obscene, may be sexually explicit.[18]

Thus, while the legislative history of Section 10 discloses an intent to import content-based regulations that may be appropriate for other media into cable, see, *e.g.*, 138 Cong. Rec. S646-47 (daily ed. Jan. 30, 1992) (statement of Sen. Helms) (referring to

---

[17](...continued)
dixit destroy the 'public forum' status of streets and parks which have historically been public forums.").

[18] Compare *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748 (1978) (concerning indecency standards applicable to broadcast) with *Sable Communications* v. *FCC*, 492 U.S. 115, 127 (1989) ("[t]he private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in *Pacifica*") and *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (distinguishing receipt of sexually explicit mail from broadcast).

restrictions on telephone communications), such importation does not satisfy the first amendment. Rather, because the unique features of cable have allowed Congress to require that operators make lockboxes available, federal courts have found that federal law already mandates the least restrictive means available to effectively curbing the exposure of unsupervised children to sexually explicit, non-obscene cable programming. For that reason, Section 10's content-based restrictions violate the first amendment.

First, unlike broadcast, cable does not involve a "captive audience" — precisely the basis on which the Supreme Court in *Sable Communications* v. *FCC*, 492 U.S. 1150, 127-28 (1989), distinguished the telephone communications it was concerned with from the broadcast at issue in *Pacifica*. It was also on this basis that federal courts have stricken local cable regulations that, like Section 10, seek to limit sexually explicit programming. Thus, in *Community Television* v. *Roy City*, 555 F. Supp. 1164 (D. Utah 1982), the court invalidated a local ordinance that sought to regulate indecent cable programming, reasoning that all cable viewers must subscribe to the service and retain the power to cancel that subscription. The court held that cable subscribers must specifically choose to invite cable programming into their home, and it therefore found inapplicable the captive audience rationale that supports the regulation of broadcast indecency. *Id.* at 1168-69. It was in part on the same basis that the Eleventh Circuit declared a similar ordinance unconstitutional, finding that "[a] Cablevision subscriber must make the affirmative decision to bring Cablevision into his home." *Cruz* v. *Ferre*, 755 F.2d 1415, 1419 (11th Cir. 1985). See also *Quincy Cable TV. Inc.* v. *FCC*, 768 F.2d 1434, 1448 n.31 (D.C. Cir, 1985) (citing *Cruz*), *cert. denied*, 476 U.S. 1169 (1986).

Second, cable presents technologies that provide subscribers even greater control over that service than they have over either broadcast or telephone. Cable is unique in offering subscribers the ability to lock out their children's receipt of specific channels that might otherwise be objectionable, just as parents may place the liquor cabinet under lock and key. Indeed, federal law mandates that all cable operators make available to their subscribers just such

lock boxes. 47 U.S.C. § 544(d)(2)(A). Thus, in finding unconstitutional a local restriction on sexually explicit programming, the Eleventh Circuit made special note of the "parental manageability of cable television" afforded by "the ability to protect children" through the use of a "'lockbox' or 'parental key'" available from Cablevision. *Cruz*, 755 F.2d at 1415, 1420. Set also *Quincy Cable TV*, 768 F.2d at 1448 n.31.

Because cable subscribers are not a captive audience and may use lockboxes to further control access to their service, additional restrictions on non-obscene cable programming are unnecessary and therefore violative of the basic first amendment principle that any restriction on speech must be narrowly tailored to achieving a compelling government interest. See *Carey* v. *Brown*, 447 U.S. 455, 461 (1980). See generally *infra* Section II. It was on this basis that the court in *Home Box Office, Inc.* v. *Wilkinson*, 531 F. Supp. 987 (D. Utah 1982), invalidated on first amendment grounds a Utah statute forbidding cable operators from knowingly distributing indecent programming, despite an asserted justification of the protection of minors. The court held that the regulation at issue would also have restricted the adult population to programming suitable for children. *Id.* at 997.

Because of the unique nature of cable television, we strongly agree with the federal courts that have struck down content-based regulations that were similar to the indecency restrictions contained in Section 10. Federal law already mandates the least restrictive means for effectively curbing the exposure of unsupervised children to sexually explicit cable programming. Section 10 therefore contemplates an unnecessary additional burden on the first amendment rights of PEG and leased access programmers and viewers, and any final rule that mirrors the statute would itself be unconstitutional.

Even if some content-based regulation could pass muster, however, it is clear that the one proposed by the Commission fails to meet constitutional minima. By parroting Section 10, the Proposed Rule incorporates all of the statute's constitutional infirmities. We now turn to an examination of the Commission's Proposed Rule.

II. THE COMMISSION HAS FAILED TO CONSIDER LESS RESTRICTIVE MEANS TO IMPLEMENT RESTRICTIONS CONTAINED IN ITS PROPOSED RULE

In order to comport with the first amendment, the content-based restrictions contained in the Commission's Proposed Rule must both further a governmental interest that is compelling and do so by the least restrictive means. *Sable Communications* v. *FCC*, 492 U.S. 115, 126 (1989); *Gibson* v. *Florida Bar*, 798 F.2d 1564, 1569 (11th Cir. 1986). *cert. dismissed*, 112 S. Ct. 633 (1991). The Commission has failed on both of these scores. It has not sufficiently articulated any underlying government interest in the restrictions it is proposing. Moreover, because it allows a total prohibition against both programming deemed to "promote" unlawful conduct (on PEG) and sexually explicit programming (on PEG and leased access), the Commission's Proposed Rule cannot be considered narrowly drawn to serve a compelling governmental purpose. *Carey* v. *Brown*, 447 U.S. 455, 461-62 (1980). Whatever the Commission's purpose, it clearly has no cognizable interest in keeping from adults either sexually explicit material or political programming that may take issue with existing law, which is of course the necessary implication of any total prohibition. Finally, because lockboxes already effectively implement the government's interest in protecting unsupervised children, even the introduction of censorship that is less than an outright ban would fail the least restrictive means test.

First, the Commission has failed to state on the record the compelling purpose that motivates the PEG restrictions contained in subsection (c) of its Proposed Rule. Such an articulation is of course a necessary predicate to determining "if it chooses the least restrictive means to further the articulated interest." *Sable*, 492 U.S. at 126. As for the leased access restrictions of subsection (a), the Commission mentions only in passing that it is concerned with "children's exposure to indecent programs" over those channels. Notice, ¶ 9, at 5. Even if that passing reference can be taken as a

full statement of the governmental interest being pursued,[19] the Commission has not developed any record evidence describing the nature and extent of that exposure. Without such a fact finding, any means implemented cannot be considered the least restrictive, because a reviewing court is left without a standard against which to judge the effectiveness of the various options. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-68 (1962) (agency must make findings based on substantial evidence in order that court has something to review). See also *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1341-42 (D.C. Cir. 1988); *cf. Sable*, 492 U.S. at 126-27.

Second, no government interest can support the complete prohibition against sexually explicit programming on PEG and leased access, which the Proposed Rule allows. While the federal courts recognize that government may at times shield children from some sexually explicit material that is not obscene, that purpose must be served by the least restrictive means towards its effective implementation. *Sable*, 492 U.S. at 126. Schemes that use child protection as an excuse to keep such material away from both children and adults fall far short of this test. See, *e.g.*, *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957) (even when attempting to protect children, regulation cannot effectively reduce adults to having "only what is fit for children"). Regardless of the medium involved, therefore, child protection has failed as an excuse for total bans on sexually explicit material, including books, *id.*, telephone

---

[19] We contend that it cannot be the requisite full statement. In the context of broadcast indecency, the court found that such an articulation came too late when it was not until oral argument that "the FCC's General Counsel, in response to the court's inquiry, clarified the government's interest: it is the interest in protecting unsupervised children from exposure to indecent material; the government does not propose to act *in loco parentis* to deny children's access *contrary* to parents' wishes." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1343 (D.C. Cir. 1988) (emphasis in original). In any event, if the same as yet unarticulated interest motivates the Commission's programming restrictions for cablecast, lockboxes present the superior means of empowering parents to supervise their children however they so choose, as we discuss below.

messages, *Sable*, 492 U.S. at 127-31, unsolicited mail, *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), and radio and television broadcasts, *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508-09 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281, *and cert. denied*, 112 S. Ct. 1282 (1992). It is thus not surprising to find that the protection of children has failed as an excuse for previous attempts to prohibit sexually explicit programming from being carried on cable. See *Cruz* v. *Ferre*, 755 F.2d 1415, 1420-21 (11th Cir. 1985); *Home Box Office* v. *Wilkinson*, 531 F. Supp. 987, 997 (D. Utah 1982); *Community Television* v. *Roy City*, 555 F. Supp. 1164, 1166 & n.8 (D. Utah 1982).

Finally, the Commission's Proposed Rule would fail the least restrictive means test even if it did not allow operators to ban all sexually explicit or politically sensitive access programming. The Commission has simply failed to show a nexus between a proper governmental purpose and the introduction of editorial control by a cable operator whose incentives bias it against programmers not of their own choosing. See *supra* pages 2-4 and 9-10. This nexus is especially doubtful because the Proposed Rule does not prevent an operator from either acting arbitrarily, using criteria not narrowly-tailored to the government purpose, or carrying on other of its channels the same types of programming it may be prohibiting from PEG and leased access.[20]

In contrast to the approach adopted by the Commission's proposed rule, lockboxes present the least restrictive means of controlling the access of minors to programming that their parents

---

[20] We also note that a least restrictive means requirement can be derived from the PEG and leased access statutes themselves. Even as amended, both state that "a cable operator shall not exercise any editorial control over" an access channel. 47 U.S.C. § 531(e) (PEG); 47 U.S.C. § 532(c)(2) (leased access). In order to keep the narrow amendments of Section 10 from swallowing this larger purpose — the preservation of a public forum — those amendments must be narrowly construed. By failing to propose safeguards such as those discussed in text, therefore, the Commission has also acted contrary to the statute.

find inappropriate, as we show below.[21] Moreover, cable operators are already required to make lockboxes available to all subscribers. 47 U.S.C. § 544(d)(2)(A). Without a finding that lockboxes are ineffective, therefore, the introduction of outside editorial control over PEG and leased access programming must be considered an unconstitutionally intrusive means of protecting unsupervised children from sexually explicit programming.

The Commission in the current docket has acknowledged that lockboxes play a role in limiting children's access to cablecast indecency. Notice ¶ 9. at 5 (lockboxes are available to subscribers to "control access to . . . cable services on the system [and] to limit access to [channels carrying indecency] to others in the household"). In other dockets, too, the Commission has spoken directly to the effectiveness of this technique. See, *e.g.*, FCC 85-179, 1985 FCC Lexis 3475, ¶ 132, at 112-13 (Apr. 11, 1985) ("Indeed, we believe that the provision for lockboxes largely disposes of issues involving the Commission's standards for indecency, and would also be a significant factor in cases related to obscenity and similar offensive programming.") (footnote omitted). Thus, when discussing techniques for reducing children's exposure to broadcast indecency, the Commission specifically noted that:

> "Technical means are available to block children's access to indecent cable programs . . . . Upon request, cable operators must provide a device such as a 'lock-box' or 'parental key' that permits a subscriber to restrict access to selected programming . . . . [Lockboxes] can restrict access by children whether or not parents are physically present and actively supervise." FCC 90-264, 5 F.C.C.R. 5297, 5305 (1990).

The Commission has not been alone in recognizing the effectiveness of lockboxes. Congress, too, has recognized both that lockboxes effectively screen indecency and that they do so without infringing on the first amendment rights of programmers and adult viewers. See H.R. No. 934, 98th Cong., 2d Sess. 70 (1984), 1984

---

[21] Examples of several lockbox owner manuals are presented in the Appendix as Exhibit O-Q.

U.S.C.C.A.N. at 4655, 4707 (quoted *supra* at 5). And the federal courts have similarly acknowledged that these devices are effective for protecting children without burdening programmers' rights to speak. See cases cited *supra* Section I.C. Indeed, lockboxes are considered superior to central blocking because they place "responsibility for making such choices . . . where our society has traditionally placed it — on the shoulders of the parent." *Fabulous Assocs. Inc.* v. *Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 788 (3d Cir. 1990). See also *Bolger*, 463 U.S. at 73-74 (parental discretion controlling access to unsolicited contraceptive advertising is the preferred method of dealing with such material).

In the face of this precedent, the Commission has simply failed to explain in any manner either why lockboxes are now no longer effective or why a more burdensome means of protecting children has become necessary.[22] Without record evidence that supports a well-reasoned determination that lockboxes are ineffective, the more restrictive option of central blocking cannot be implemented. *Cf. ACLU* v. *FCC*, 823 F.2d 1554, 1579 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

III. THE COMMISSION'S PROPOSED REGULATIONS ARE CONSTITUTIONALLY DEFICIENT BECAUSE THEY ARE UNDERINCLUSIVE

Because the constitution will tolerate a content-based restriction on speech only when it "is necessary to serve a compelling state interest and. . . is narrowly drawn to achieve that end," *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), the failure of such a restriction to address the entirety of a problem "undermine[s] [the] claim that the prohibition . . . . can be justified by reference to the State's interest." *Carey* v. *Brown*, 447 U.S. 455, 465 (1980). Underinclusiveness thus stands as an

---

[22] Nor has the Commission explored other alternatives that may be considered less restrictive than a ban or central blocking, such as a nighttime safe harbor. *Cf. Action for Children's Television*, 932 F.2d at 1509 (concerning Commission promulgation of nighttime safe harbor for broadcast).

important standard against which to judge content-based restrictions on speech. See *FCC* v. *League of Women Voters*, 468 U.S. 364, 396-98 (1984) (underinclusiveness as basis for striking down ban on editorializing on only noncommercial stations receiving public funds); *Community-Service Broadcasting* v. *FCC*, 593 F.2d 1102, 1122 (D.C. Cir. 1978) (en banc) (underinclusiveness as basis for striking down requirement that only noncommercial educational broadcast stations retain audio recordings of broadcasts).

Taken as a whole, the Commission's Proposed Rule is unconstitutionally underinclusive and thus cannot be considered to further a compelling goal. This underinclusiveness results from the Commission's decision to parrot Section 10 in its Proposed Rule. Although one Senate sponsor purported to be concerned with "forbid[ding] cable companies from inflicting their unsuspecting subscribers with sexually explicit programs," 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms), Section 10 is targeted only at PEG and leased access channels. Congress therefore granted the Commission the power to regulate through prohibitions and blocking only a small part of what it regarded as a larger problem. Because the larger problem is not addressed, however, the goal of the statute can hardly be considered compelling.

In largely reiterating Section 10, the Commission's Proposed Rule mirrors this constitutional defect and further demonstrates the lack of any compelling state interest. The only governmental interest that the Commission has mentioned with respect to its Proposed Rule is that "children's exposure to indecent programs is effectively eliminated." Notice ¶ 9, at 5. In line with its limited authority under Section 10, however, the Commission can only target access channels. It has no statutory authority to apply these strictures across the board, and, even if it did, to do so now without further notice and comment would violate the Administrative Procedures Act. See generally *infra* Section VI. Finally, an across the board restraint would self-evidently greatly magnify all of the other constitutional concerns outlined in these Comments.

Moreover, the Commission has failed to narrowly interpret the statute in a way that would provide for even-handed application —

i.e. to prevent operators from prohibiting from access channels the same types of programming it carries on other of its channels. Because the Proposed Rule omits such a safeguard, the Commission would allow a cable operator to cablecast sexually explicit programs over non-access channels while it prohibited the same type of programming on access channels.[23]

The underinclusiveness common to both the statute and the Proposed Rule is especially suspect because the legislative history of the Act demonstrates that Congress was aware that cable operators carry sexually explicit programming on channels other than leased access.[24] For example, floor statements evidence a concern that the Playboy Channel had been carried over a leased access channel in Puerto Rico. 138 Cong. Rec. S646, S652 (daily ed. Jan. 30, 1992) (statement of Sen. Helms). While the Commission's proposed regulations might require that the Playboy Channel be scrambled on leased access, it places no similar restriction on its carriage over the other cable channels on which it far more typically appears.

Section 15 of the Act, which concerns unsolicited sexually explicit "premium channel" programs, also demonstrates that Congress was aware of sexually explicit nonaccess programming but did not find that prior blocking was necessary. Rather, Congress found that the problem was sufficiently resolved by allowing subscribers to request central blocking of the unsolicited premium channel — just as they can use lockboxes to block pre-

---

[23] In *dicta*, the Supreme Court in *R.A.V.* v. *City of St. Paul, Minn.*, 112 S. Ct. 2538, 2545 (1992), stated that no fatal underinclusiveness is presented by "a State's prohibiting obscenity (and other forms of prescribable expression) only in certain media." Because the Commission's Proposed Rule differentiates between cablecasts over the same media, however, the Court's *dicta* in this regard is inapposite. Moreover, the Proposed Rule goes well beyond proscribable expression and intrudes upon constitutionally-protected speech.

[24] Nor has the Commission in this docket developed any facts on the record tending to show that access programming is somehow a greater problem.

existing channels (including access channels) if sexually explicit programming on these channels was unwelcome. See generally *supra* Section II (discussing lockboxes).

The narrow scope of Section 10 and the Commission's Proposed Rule is especially invidious in this context. The users of PEG and leased access channels have traditionally been those less powerful interests who otherwise have no access to the electronic media — a situation that is only reinforced by Section 9 of the Act, which specifically encourages the use of leased access by "programming source[s] which devote[ ] substantially all of [their] programming to coverage of minority viewpoints, or to programming directed at members of minority groups." Section 9(c) (codified at 47 U.S.C. § 532(i)). The Supreme Court's caution in *Cornelius*, v. *NAACP Legal Defense & Educ. Fund. Inc.*, 473 U.S. 788 (1985), is therefore particularly apt. When the "purported concern [is] to avoid controversy excited by particular groups," warned the Court, distinctions "may conceal a bias against the viewpoint advanced by the excluded speakers." *Id.* at 812. *Cf. R.A.V.* v. *City of St. Paul, Minn.*, 112 S. Ct. 2538, 2547 (1992) (banning some types of words but not others presents a "realistic possibility that official suppression of ideas is afoot").[25]

In sum, Section 10 and the Commission's Proposed Rule do not pursue a compelling state interest, and the Commission cannot overcome the statute's underinclusiveness by simply applying the scheme set out in Section 10 to all cable channels. Neither the 1992 Act nor the 1984 Act affords the Commission any such sweeping authority, which would be unconstitutional in any event.

---

[25] *R.A.V.* too, is especially apt with respect to the Commission's standards for censoring PEG. In an apparent attempt to cover all programming that might in any way be considered inappropriate for children, that standard allows the censoring of both indecency and "material soliciting or promoting unlawful conduct." Because the Proposed Rule does not, however, proscribe all but the enumerated forms of allegedly inappropriate speech, it must be considered as an unconstitutional attempt to "regulate use based on hostility — or favoritism — towards the underlying message expressed." 112 S. Ct. at 2545.

However, the use of regulations concerning lockboxes — which *are* authorized by statute — to implement the constraints of Section 10 would permit the Commission to address Congress's concern for protecting unprotected children from cable programming their parents find inappropriate, and to do so on an evenhanded basis that applies to all cablecasts.

IV. THE STANDARDS FOR PROHIBITING SPEECH THAT ARE PROPOSED BY THE COMMISSION ARE OVERBROAD AND HENCE UNCONSTITUTIONAL

The Commission's Proposed Rule is overbroad in two different respects. First, the standard for prohibiting PEG programming intrudes upon protected speech. Second, the Commission has not given a narrowing construction to the liability standard contained in Section 10(d).

First, while the federal courts have occasionally suffered the regulation of speech when it is the only way to protect children, they have more generally recognized that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 212-13 (1975) (citations omitted). Far from being "narrow and well-defined," however, subsection (c) of the Commission's Proposed Rule covers "material soliciting or promoting unlawful conduct," a broad and vague expanse that renders the standard regarding PEG restrictions unconstitutionally overbroad. See *e.g.*, *Village of Shaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 633-39 (1980); *Bigelow* v. *Virginia*, 421 U.S. 809, 815-18 (1975).

Generally, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of. . . law violation," the only exception being inapplicable to the present situation — "where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action." *Hess* v. *Indiana*, 414 U.S. 105, 108 (1973) (quoting *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969)). See also *Noto* v. *United States*, 367 U.S. 290, 297-98 (1961) ("the mere abstract teaching . . . of the moral propriety or even moral necessity for a

resort to force and violence[ ] is not the same as preparing a group for violent action and steeling it to such action"). To preserve our political system's ability to change in the face of evolving notions of justice, the government cannot prevent the citizenry from advocating civil disobedience against unjust laws — *e.g.*, advocating for the underground railroad to fight slavery or advocating the refusal to sit at the back of the bus to fight segregation.

Similar problems are posed by the PEG restriction on "sexually explicit conduct." This standard omits provisions requiring either that the depiction be "patently offensive" or that it fail under a community standard. It thereby restricts far more speech that has ever been heretofore countenanced, even in protecting minors.[26]

The Commission recognizes the overbreadth of these provisions when it suggests in its Notice that these terms would have to be narrowed. ¶ 13, at 6 n.11. Subsection (c) of the Commission's Proposed Rule contains no such limiting construction, however, and it therefore remains overbroad. At the least, any final rate that the Commission may promulgate in this docket should explicitly narrow the PEG standard to obscenity, indecency as elsewhere defined, and soliciting prostitution.[27]

Second, the Commission has also failed to offer a limiting construction of Section 10(d), which extends liability to cable operators who carry programming that "involves obscene material." While it might be the case that liability could be imposed in the

---

[26] Even were the Commission to limit "sexually explicit conduct" to indecency, we note that the indecency standard, too, raises serious first amendment concerns. See *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[27] An avowal by the Commission that they would adhere to any limiting construction not contained in the final rule itself is insufficient in this regard for two reasons. First, because section (d) of subsection 10 is a waiver of a liability immunity, others besides the Commission will be making liability determinations. Second, even if the determination were to be made by the Commission, its avowal does not have the binding force of a rule. *Bella Lewitzky Dance Found.* v. *Frohnmayer*, 754 F. Supp. 774, 782 (C.D. Cal. 1991).

proper circumstances — which would have to include procedural protections that are now absent (see *infra* Section V) — for carrying obscenity itself, in no case could it extend to carrying material that "involves" obscenity. Because the "involves" standard is an indefinite and nebulous term that fails to put cable operators on notice as to what programming may subject them to liability, Section 10(d) is unconstitutionally vague and overbroad. *Cf. Bella Lewitzky Dance Found.* v. *Frohnmayer*, 754 F. Supp. 774, 781 (C.D. Cal. 1991) (finding unconstitutionally vague a standard concerning material which in the judgment of the NEA may be considered obscene).

To survive first amendment scrutiny, a statute must be drafted with precision. See *Hobbs* v. *Thompson*, 448 F.2d 456, 460 (5th Cir. 1971) ("The overbreadth doctrine, therefore, focuses directly on the need for precision in legislative draftsmanship to avoid conflict with First Amendment rights."); *cf. Video Software Dealers Ass'n* v. *Webster*, 773 F. Supp. 1275, 1280 (W.D. Mo. 1991) (statute regulating protected speech must have purpose articulated with great precision; where purpose of statute not clearly articulated, statute stricken as overbroad), *aff'd*, 968 F.2d 684 (8th Cir. 1992). Thus, words such as "involving" and "tending," which foster indefiniteness, lead to imprecision and constitutional infirmity. For that reason, the Supreme Court in *Gooding* v. *Wilson*, 405 U.S. 518 (1972), found unconstitutional for vagueness and overbreadth a statute that outlawed speech "tending to a breach of the peace" because this standard was "'infinitely more doubtful and uncertain'" than "breach of the peace." *Id.* at 427 (citations omitted). See also *Gregory* v. *City of Chicago*, 394 U.S. 111, 119 (1969) (Black, J., concurring). Section 10(d)'s liability standard suffers from the same infirmity and, without a narrowing construct, cannot be considered constitutional. *Cf. Grayned* v. *City of Rockford*, 408 U.S. 104, 111 (1972) ("tends to disturb" imprecise when not construed narrowly).

V. THE COMMISSION HAS PROPOSED PROCEDURES FOR PROHIBITING SPEECH THAT ARE CONSTITUTIONALLY DEFICIENT

The Proposed Rule envisions denying programmers the ability to use PEG and leased access based on the sexually explicit or politically controversial nature of their message, thereby constituting a system of content-based prior restraints. See *Ward* v. *Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989) (denial of the use of a forum prior to actual expression constitutes a prior restraint); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975) (same). "While [p]rior restraints are not unconstitutional *per se*. . . [a]ny system of prior restraint . . . comes . . . bearing a heavy presumption against its constitutional validity.'" *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 225 (1990) (quoting *Southeastern Promotions*, 420 U.S. at 558). See also *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963).[28]

The federal courts have long held that to survive this strict constitutional scrutiny, prior restraints must, at a minimum, "take[ ] place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965). The Proposed Rule that the Commission has issued in this docket omits any such procedural protection. For that reason alone, it is unconstitutional.

With respect to only PEG, the Commission's Notice does ask for comments regarding procedures "to govern disputes between the cable operator and programmer," proposing that "any such disputes should be handled at the local level." ¶ 14, at 7. As an initial

---

[28] As prior restraints, the proposed regulations stand in marked contrast to various "dial-a-porn" regulations that have been promulgated by the FCC and upheld by the Courts. Those regulations have no prior restraints because, rather than preventing the transmission of the sender's messages, they only hinder their receipt by minors. See *Dial Info. Servs. Corp.* v. *Thornburgh*, 938 F.2d 1535, 1543 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 966 (1992); *Information Providers' Coalition* v. *FCC*, 928 F.2d 866, 877-78 (9th Cir. 1991). It should be noted in this context that lockboxes, too, do not constitute prior restraints.

matter, even were this request to lead to some sort of dispute resolution mechanism, it would not extend to leased access programmers. Moreover, even if it did provide full coverage, no system of the type envisioned could provide sufficient protection for the constitutional rights that are at stake. An informal dispute resolution mechanism will not satisfy the first amendment's requirement for procedural safeguards.[29] Rather, such safeguards must include at least three elements:

> "*First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured." *Southeastern Promotions*, 420 U.S. at 560.

Because these elements are absent from informal dispute resolution, the notice does not request comment on a constitutionally sufficient system of procedural protections. Rather, the only constitutionally permissible system of dispute resolution would require operators to go to court for an adjudication that a specific program is obscene before that program may be kept off the cable system.

The Commission's Proposed Rule is also procedurally defective with regard to the standard by which a cable operator may be held liable for carrying "material involving obscenity." Liability for obscenity requires that the actor know the content of the material found obscene, *Smith* v. *California*, 361 U.S. 147, 152-54 (1959); *Video Software Dealers Ass'n* v. *Webster*, 968 F.2d 684, 690 (8th Cir. 1992) ("any statute that chills the exercise of First Amendment rights must contain a knowledge element"), but neither the statute nor the proposed Rule contains any such knowledge requirement.

---

[29] Nor does the Commission propose procedures that will protect programmers from arbitrary decisions by operators, whose incentives are contrary to access channels. See *supra* pages 2-4 and 9-10. The Proposed Rule failed to include safeguards against delay, for example, or against invidious discrimination.

Given the present circumstances, the Commission should grant operators immunity from liability unless knowledge of obscenity is established through an operator's awareness that the implicated program had been determined to be obscene in a prior judicial determination in the same community. *Cf. Bella Lewitzky Dance Found.* v. *Frohnmayer*, 754 F. Supp. 774, 783 (C.D. Cal. 1991) (chilling effect of vague statute requires judicially administered procedural protections). This would more fully implement the policies behind the knowledge element, which is required in order to circumscribe the chilling effect that will flow from imposing liability from speech. Ordinarily, the knowledge requirement works in tandem with the requirement that the provision specify the prescribable speech with particularity. Here, because Section 10(d) reaches programming that "involves obscene material," that particularity is missing. By requiring that knowledge be established only by a prior judicial determination has declared a program obscene, the Commission will move towards restoring the proper first amendment balance.[30]

VI. THE COMMISSION'S INSUFFICIENT NOTICE OF ITS PROPOSED REGULATIONS PREJUDICES INTERESTED PARTIES' RIGHT TO COMMENT

We have already demonstrated that, in a number of different ways, the Commission has failed to act according to the precepts of administrative law. First, it has failed to articulate the purposes that will be served by its Proposed Rule. See *supra* page 43. Second, it has failed to present record evidence concerning the existence of whatever problem its Proposed Rule is intended to solve. See *supra* page 44. Third, it has failed to present its

---

[30] The Commission recognizes this knowledge requirement when it proposes to waive Section 10(d) for operators who have not been informed by programmers that their programming is obscene. As a matter of logical consistency, the Commission should also state in its final rule that an operator is not enabled to prohibit a program pursuant to Sections 10(b) and 10(c) when it has not been informed by a prior judicial determination that the program is obscene.

reasoning as to the way that the Proposed rule would serve as a means of solving that problem. See *supra* pages 45-46.

An additional administrative law problem pervades this docket. Section 553(b)(3) of the Administrative Procedures Act (the "APA") requires an agency initiating a rulemaking to issue a notice that includes a complete description of either the terms of the proposed rule or the subjects and issues involved. 5 U.S.C. § 553(b)(3). The Commission has failed in this regard in several different respects.

With respect to PEG generally, the Notice is literally without standards. Paragraph 14 asks commenters to address "whether our regulations should provide for any additional matters not expressly addressed in the statute," and it "invite[s] interested persons to comment on these and any other aspects that they believe would be germane to proper implementation of this provision." This general request for comments fails to "describe the range of alternatives being considered with reasonable specificity." See *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("interested parties [do] not know what to comment on").

The Notice also fails to speak concretely about several specific PEG proposals. For example, Paragraph 14 also invites comment on whether the Commission should require "certifications by users or operators that no materials fitting into any of these statutory categories will be presented" on PEG. The Proposed Rule itself, however, makes no mention of such certification, despite the fact that it is clearly being contemplated by the Commission. It therefore runs afoul of the requirement of a detailed proposed rule, which "allows the parties to direct their comments toward concrete proposals, not amorphous subject areas. Such an approach is designed to generate a focused inquiry by both the agency and the parties." *National Tour Brokers Ass'n* v. *United States*, 591 F.2d 896, 901 (D.C. Cir. 1978).

Similarly, the Proposed Rule omits any formulation for the Commission's contemplated implementation of "specific procedures . . . to govern disputes between the cable operator and programmer of these [PEG] access channels." Notice ¶ 14. This again

prejudices the right of parties to direct their comments towards concrete proposals.

All of these errors are replicated in the notice with respect to leased access. For example, Paragraph 12 contains the same problematic general invitation asking commenters "to bring to our attention any other matters not discussed in this notice" and "seek[ing] comment on any other requirements that should be adopted in order to effectuate the new law's provisions." In Paragraph 11, the Commission seeks comment on whether cable operators "can require program providers to certify that their programming is not obscene or indecent," despite the fact that the Proposed Rule mentions nothing about the form, content or any other aspect of the proposed certification. Indeed, despite this absence, the Commission "assume[s]" that such certification is appropriate.

Similarly, Paragraph 9 requests comment on "blocking mechanisms and procedures relating to subscriber access," but none are contained in the Proposed Rule. And Paragraph 12 asks commenters to address two issues not the subject of the Proposed Rule itself: "whether a cable operator should be required to retain notifications for a prescribed period of time," and (ironically, given the absence of this proposal from the Proposed Rule), "whether a cable operator should be held harmless from liability under our *proposed rules* if it does not receive any, or timely, notification from a programmer" [emphasis added].

These deficiencies present three related administrative law problems. First, Section 553(b) requires an agency giving notice to "make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible." *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). See also *Florida Power & Light Co.* v. *United States*, 846 F.2d 765, 771 (D.C. Cir. 1988) (notice "must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully"), *cert. denied*, 490 U.S. 1045 (1989); *Connecticut Light & Power Co.* v. *NRC*, 673 F.2d 525, 530 (D.C. Cir.) ("If the notice of proposed rule-making fails to provide an accurate picture of the reasoning

that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals."), *cert. denied*, 459 U.S. 835 (1982). The Commission's numerous omissions fall far short of this standard, however. The final rule will necessarily "deviate[ ] too sharply from the proposal, [and] affected parties will be deprived of notice and an opportunity to respond to the proposal." *Small Refiner*, 705 F.2d at 547.

Second, by avoiding the promulgation of concrete proposals, the Commission has also avoided going into detail as to its reasoning behind offering the suggested items. As the federal courts have instructed, "the notice required by the APA must disclose *in detail* the thinking that has animated the form of a proposed rule and the data upon which that rule is based." *Home Box Office*, 567 F.2d at 35 (emphasis added). Without this discipline, the quality of the final rulemaking suffer for want of the proposal being "tested by exposure to diverse public comment." *Small Refiner*, 705 F.2d at 547. See also *National Ass'n of Home Health Agencies* v. *Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637, 641 (1st Cir. 1979). *cert. denied*, 444 U.S. 1096 (1980).

Third, without the agency's full reasoning and the exchange of views it engages from the public, a notice as insufficient as the Commission's compromises judicial review as well as. See *Home Box Office*, 567 F.2d at 35. Without precision concerning the contemplated agency action, commenters are deprived of their ability "to develop evidence in the record to support their objections," which further compromises judicial review. *Small Refiner*, 705 F.2d at 547.[31]

---

[31] See also *McLouth Steel Prods. Corp.* v. *Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988) (an agency's consideration of comments, "no matter how careful," cannot cure the defect of inadequate notice); *AFL-CIO* v. *Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985) (proper notice cannot be attributed to parties on the assumption that they monitor the comments of others); *New Jersey* v. *EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1983)

(continued...)

We therefore urge that the Commission, in response to the instant comments and those submitted by other parties, issue a second proposed rulemaking and accept a second round of comments to allow for the full participation required by the APA We note in this regard that Section 10's statutory deadlines for the promulgation of rules presents no hurdle to the Commission. The federal courts have recognized that a statutory deadline must yield to the requirements of the APA when, as here, "Congress gave no explicit indication that it intended to override the procedural safeguards of the APA." *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377, 380 (3d Cir. 1979). See also *New Jersey* v. *EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); *United States Steel Corp.* v. *EPA*, 595 F.2d 207 (5th Cir, 1979).

CONCLUSION

Where a government has intentionally opened a forum for discourse, it cannot simply authorize restrictions on speech in that forum either directly or through a private party acting with its authority. Rather, any restriction on speech must be carefully tailored to balance the interests of government against those who wish to speak. If those restrictions are not narrowly drawn, the restrictions are unconstitutional.

---

[31](...continued)
(permitting an agency to consider comments requested after publication of a final rule to substitute for proper notice would render the APA "virtually unenforceable"); *Small Refiner*, 705 F.2d at 549 (having failed to provide proper notice, an agency cannot "bootstrap" notice from a comment). Moreover, because proper notice is a prerequisite to proper rulemaking, a party's separate right to subsequently petition for amendment of a final rule does not obviate an agency's duty to provide proper notice of a proposed rule in the first place.

> "5 U.S.C. § 553(b) requires notice *before* rulemaking, not after. The right of interested persons to petition for the issuance, amendment, or repeal of a rule, is neither a substitute for nor an alternative to compliance with the mandatory notice requirements of § 553(b)." *National Tour Brokers, supra*, 591 F.2d at 902.

The Commission has failed to undertake the appropriate balancing in the instant docket. Instead, it has simply reiterated the provisions of Section 10. The result is a Proposed Rule infected by serious constitutional defects: a lack of articulated purpose, failure to examine the nexus between any such purpose and the chosen means, no attention to alternatives, and a failure to include safeguards. With its rulemaking in this posture, before the Commission issues a final rule, it should again accept public comments once it has presented on the record its reasoning with respect to these basic issues.

Respectfully submitted,

I. Michael Greenberger
David A. Bono
Shea & Gardner
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for the Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way

Of Counsel:

James N. Horwood
Spiegel & McDiarmid
1350 New York Ave., N.W.
Washington, D.C. 20005
(202) 879-4002
Counsel for the Alliance for Community Media and the Alliance for Communications Democracy

Marjorie Heins
American Civil Liberties Union Foundation
Arts Censorship Project
132 West 43rd Street
New York, New York 10036
(212) 944-9800
Counsel for the American Civil Liberties Union

Andrew Jay Schwartzman
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036
(202) 232-4300

Elliot Mincberg
People for the American Way
2000 M. Street, N.W.
Washington, D.C. 20036
(202) 467-4998
Counsel for People for the American Way

CABLE TELEVISION AND THE PUBLIC INTEREST

PATRICIA AUFDERHEIDE

Made in United States of America
Reprinted from Journal of Communication
Vol 42, No. 1, Winter 1992
© 1992 by Oxford University Press

* * *

Public Access as a Public Space

Access programs often have been, in the words of one tired access director, "programmed to fail." This is less remarkable than the fact that they exist at all. Only canny, ceaseless, locality-by-locality citizen activism wrested access centers and channels in the franchise process in the first place (Engelman, 1990), and all such victories are temporary. The 1984 Act sabotaged some of those victories. It had capped localities' franchise fees and required them to be unrestricted. It did not require access channels. Points of confusion in the law — particularly the definition of "service" — as well as restrictions on renewal procedures, among others, made it easy for cable operators to pay more attention to their bottom line and for franchisers to pay more attention to road paving than to cable access. (Meyerson, 1990; U.S. Senate, 1990a, pp. 453-490; Ingraham, 1990; Brenner, Price, & Myerson, 1990, sec. 6.04[3][c], 6.04[4]).

Even under starvation conditions, access has carved out a significant role in the minority communities where it exists. Currently 16.5% of systems have public access; 12.9% have educational access, and 10.7% have governmental access (*Television and Cable Factbook*, 1990, p. C-384). An abundance of local programming is produced in some 2,000 centers — about 10,000 hours a week (Ingraham, 1990), far outstripping commercial production. The Hometown USA Video Festival, showcasing local origination and PEG channel production annually, in 1990 attracted 2,100 entries from 360 cities in 41 states.

These channels are often perceived to be valued community resources, using traditional measures. One multisite study shows that 47% of viewers watch community channels, a quarter of them at least three times in two weeks; 46% say it was "somewhat" to "very" important in deciding to subscribe to or remain with cable (Jamison, 1990). Another study, commissioned by Access Sacramento, showed that two-thirds of cable subscribers who knew about the channel watched it (Access Sacramento, 1991). Access centers provide resources and services typically valued at many times what they cost. Access Sacramento, for instance, estimates

a community value of its equipment, training, and consultation at $4.5 million, ten times its budget (Access Sacramento, 1990), an estimate corroborated by the experience of access cable in Nashville and Tucson.

But the most useful measure is not, and should not be, numbers of viewers or positive poll results, but the ability of access to make a difference in community life. Access cable should not function like American public television does. Public television offers a more substantial, thoughtful, challenging, or uplifting individual viewing experience than a commercial channel. Access needs to be a site for communication among and between members of the public as the public, about issues of public importance.

Beyond a basic technical level of quality, the entertainment value of such programming comes far secondary to its value as a piece of a larger civic project, whether it is citizen input into actions the local city council is making, or discussions of school reform, or a labor union's donation of services to low-income residents, or the viewpoints of physically challenged people on issues affecting them. This is because viewers are not watching it as individual consumers, but as citizens who are responding to a controversy. In each case, the program — unlike a commercial broadcast or cable service — is not the end point, but only a means towards the continuing process of building community ties.

In small and incremental ways, the access cable channel acts as a public space, strengthening the public sphere. In Tampa, Florida, for instance, public access cable provided the primary informational vehicle for citizens concerned abut a county tax that was inadequately justified. Major local media, whose directors shared the interests of politicians, had failed to raise accountability issues. The tax was defeated in a record voter turnout. Also in Tampa, the educational cable access system's airing of school board meetings has resulted in vastly increased public contact with school board members and a children's summer reading program in which libraries', schools', and the access center's work together has

resulted in the committee members, officers of 13 different institutions, finding other common interests.[1]

Access does not need to win popularity contests to play a useful role in the community. It is not surprising if people do not watch most of the time. (Indeed, given the treatment access gets by cable operators, it is a kind of miracle that viewers find the channel at all.) It is indicative of its peculiar function that people find the channel of unique value when they do use it. Different kinds of access are used for very different purposes. Government and educational channels may feature such programming as the city council meeting, the school board meeting, the local high school's basketball game, religious programming or rummage-sale announcements on a community billboard. Some colleges have sponsored oral history sessions that illuminate immigrant history (Agosta, Rogoff, & Norman, 1990; Nicholson, 1990).

Public access channels, run on a "first-come, first-served" basis, are responsible for much of access cable's negative image, and some of its most improbable successes. There is often a strong element of the personalist and quixotic in the programming. Public access channels are sometimes a source of scandal and legal controversy, as for instance when the Ku Klux Klan started circulating national programs for local viewing (Shapiro, 1990, pp. 409f; Brenner et al., 1990, sec. 604[7]). Less reported is that often the Klan programs spurred civil liberties and ethnic minorities organizations to use the access service for their own local needs, and these groups have continued to do so. Voluntary associations

---

[1] Interviews with the following people between September 1990 and August 1991 informed the analysis of access cable: Andrew Blau, then communications-policy analyst, United Church of Christ Office of Communication, New York; Alan Bushong, executive director, Capital Community TV, Salem, OR; Gerry Field, executive director, Somerville Community Access Television, Somerville, MA; Ann Flynn, Tampa Educational Cable Consortium; Nicholas Miller, lawyer, Miller and Holbrooke, Washington, D.C.; Elliott Mitchell, ex-executive director, Nashville Community Access TV, TN; Randy Van Dalsen, Access Sacramento, CA.

— for instance, the Humane Society's adopt-a-pet program in Fayetteville, Arkansas — and a musical education series sponsored by the Los Angeles Jazz Society (Nicholson, 1990), also use public access. In some places — for instance, New York City, where Paper Tiger television regularly produces sharply critical programs on the media; or Austin, Texas, home of one of access cable's oldest talk shows — public access has become an established alternative voice in public affairs. Public access is host to viewpoints as diverse as those of leftist critics of the Gulf War (in Deep Dish TV's national series) and those of conservative Rep. Newt Gingrich (R-GA), who hosts half-hour shows produced by the Washington, DC-based American Citizens' Television (ACTV).

Thus access has a history of fulfilling a role of community service and has been recognized in law as performing a useful First Amendment function. Access cable could, in every locality, provide an unduplicated, local public forum for public issues.

Public Access under Assault

Since the 1984 act, however, access cable has been under relentless assault, both by cable companies and by cities under financial pressure to use nontargeted franchise fees (Ingraham, 1990). In municipalities such as Pittsburgh, Pennsylvania; Milwaukee, Wisconsin; and Portland, Oregon; cable companies immediately rescinded or renegotiated franchise terms regarding cable access, once the act went into effect.

Even when access was established or reestablished, the cost was significant. For instance, in Austin, Texas, the Time-owned company announced that it could not afford to meet its franchise obligations — especially its $400,000-a-year funds for access television and the provision of eight channels — only two weeks after deregulation went into effect. It took 11 months of civic organization and city council pressure, and some $800,000, to restore the provisions.

In localities beset with fiscal crisis — a widespread problem, since in the 1980s many costs of government were shifted downwards — revenues once designated to access have gone into general revenues. For instance, when Nashville found itself in a

budget crisis in 1988, a program by a gay and lesbian alliance on public access triggered a city council debate. The cable company, a Viacom operator, a supported city council members trying to rechannel access funds into general operating funds. The upshot was near-total defunding of the access center. In Eugene, Oregon; and Wyoming, Michigan; among others, municipalities have drastically cut or eliminated access budgets in favor of other city projects.

Cable policy in the public interest might well improve the dismal legal situation for access, as well as define clearly its role as a site where the public sphere can be strengthened. Policy could go further still, creating new mechanisms for use of the medium as an electronic public space. So far, legislative reform proposals have been virtually silent on access, much less on any as yet untested mechanisms to create new public spaces.

* * *

THE AMERICAN UNIVERSITY

Washington, D.C.

PUBLIC ACCESS CABLE PROGRAMMING, CONTROVERSIAL SPEECH, AND FREE EXPRESSION

By Patricia Aufderheide

December 1992

Patricia Aufderheide is an assistant professor in the School Communication at The American University.

© copyright 1992 Patricia Aufderheide

School of Communication

4400 Massachusetts Avenue, N.W.,
Washington D.C. 20016-8017
(202) 885-2060

Access cable—the channels variously known as public, educational and governmental (or PEG) and offered as part of basic cable wherever they have been called for in franchises — is that rare site on cable where public interest comes before profit (Aufderheide, 1992). Its past is embattled; it was created in uphill struggles by local community activists, and survived only where constantly defended — in perhaps 15 percent of cable systems nationwide. The Cable Communications Policy Act of 1984 (47 USC, 521-559), which dramatically reduced the power of local authorities to regulate through franchising and furthermore sapped access' funding mechanisms, weakened access' relationships with both local authorities and with cable companies.

Its present is no better. The Cable Television Consumer Protection and Competition Act of 1992 did nothing to repair earlier damage and, indeed, added language that may complicate access' function further. One provision of the Act in fact could challenge the fundamental purpose of public access and rob it of its unique function within cable television: to permit speakers open access to the community of viewers without censorship. That provision says, first, that a cable operator may prohibit on PEG channels "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." It also creates liability for cable operators in the case of obscene material (U.S. House of Representatives, 1992, 29).

Public access cable's free speech function is central to defining its social importance. Congress intended it to serve as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet" (U.S. House of Representatives, 1984, 21-22). Public access' mandate is thus linked to the implications of the first amendment; it is a public forum, a facilitator of public conversation.

Public access in protected in the 1984 act, which requires cable operators to carry it without interference, making speakers responsible for their own speech. The Act provides for viewer control over potentially offensive material by mandating lockboxes or channel blocking options. However, public access' first-come first-serve, open access principle is complicated in practice, not

least by the interest that local governments and cable companies have in the performance of these channels but also by practical questions of scheduling and handling demand on the service on the part of access managers (Meyerson, 1987-88, 189-91).

This study explores the social function of public access, as seen in programming that is or is seen as potentially controversial—the programming that could be in jeopardy with the 1992 Act. The study's objectives were to identify such programming and incidents of prohibiting such programming, and to estimate how editorial responsibility would alter the function and purpose of access, as perceived by access directors.

Some 31 access directors—chosen through their participation in the Alliance for Community Media, which represents the interests of cable access — were interviewed by telephone. Most (20) headed independent nonprofit entities; the rest were functionaries of local government (9) or the cable company (2). The majority (21) came from smaller communities, while 10 worked in major cities or state capitals. The sample was regionally diverse, with 13 from the East, seven from the Midwest, three from the South, and eight from the West. Roughly speaking, this diversity was typical of the population of the Alliance, and probably of access nationwide (although this phenomenon is dispersed and localized enough to lack dependable national statistics).[1]

The study was further bolstered by analysis of preliminary results of a mail survey asking the same questions, sent to access directors on the mailing list of the Alliance for Community Media. Among the 30 mail survey respondents, 21 headed nonprofit entities. Three centers were run by the city, and three by the cable company (two gave no information). Twenty-one were from smaller communities; nine were from major cities or state capitals. Thirteen came from the East, nine from the Midwest, one from the South, and seven from the West.[2]

PROGRAMMING THAT TESTS THE LIMITS

Access programming varies dramatically from locality to locality; what may be acceptable in Cambridge, MA is unimaginable in Defiance, OH or Olympia, WA. Access directors

typically believe that if production usually reflects a concern somewhere in that community. "If it has an audience," said director Deb Vinsel in Olympia, WA, "it's part of your community, even if you wish it were not."

Public access often provides a unique venue in electronic media for unpopular opinions, minority viewpoints or expressions of minority culture. Access directors, when asked to consider recorded programming that a cautious programmer might reject for fear of being interpreted as containing "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct," almost universally cited several examples. Those fell into several categories:

—sex education, particularly AIDS education. Series such as Fairfax (VA) Cable Access Corporation's *Gay Fairfax*, Grand Rapids (MI) Community Media Center's *The Lambda Report*, Tucson (AZ) Community Cable Corporation's *Empty Closet* would all be suspect for "sexually explicit conduct" related to AIDS education. So would be single programs such as Cambridge (MA) Community TV's *Truth or Consequences: A Guide to Safe Sex at MIT*, *AIDS*, a documentary cablecast at Spring Point Community television Center in South Portland, ME; and an AIDS prevention special involving role playing at Kalamazoo (MI) Community Access Center.

—health education. In Amherst (MA), a video of a home birth might have fallen under scrutiny. *Desperately Seeking Susan*, a program in Olympia, WA, hosted by a therapist, has featured delicate subjects, including one program on non-orgasmic women, with frank discussion of sexual behavior.

—opinions at the political margins, for potentially soliciting or promoting unlawful conduct. Libertarians, anarchists, rightists and leftists all variously use cable access to promote political opinion slighted by gatekeepers in mainstream media. As well, passionate believers in particular political issues, such as abortion or homosexual rights, look to this venue.

For instance, in Grand Rapids producers of a regular series *Lies of Our Times* have at times endorsed sanctuary for Latin American

refugees and encouraged blockades of government offices in protest of various official positions. In Sacramento, *Libertarian Conspiracy* producers, in accord with their minimalist approach to government, decry the criminalizing of marijuana. Tucson access center director Sam Behrend notes that both *Libertarian Review* and *Time for Hemp*, a regular series by supporters of legalization of marijuana, might become suspect programs; similarly a one-time program in Kalamazoo (MI), *Cannabis*, might not have run. A Fort Wayne late night weekly program, *Ganymedian Slime Mold*, produced by an idiosyncratic leftist, might not be acceptable simply for its unpredictability, according to access director Greg Vawter; another local program *American Atheists* might become suspect, he believes, simply for not conforming to mainstream behavior. In at least one case in a regular program in Portland, OR, a speaker recommended direct and illegal action to protect old timber growth.

Several access centers (Forest Park, OH; Fort Wayne, IN; Sacramento, CA; Kalamazoo, MI; Portland, OR; Dayton, OH; South Portland, ME) reported either local or imported programs opposing abortion, some by Operation Rescue, which either encourage blocking of access to abortion clinics or include graphic, possibly offensive images or both. These programs would be suspect under a gatekeeping arrangement.

In Oregon during election season 1992, ballot measure 9, which would have criminalized some homosexual behavior, was hotly debated on access cable. Oregon access center directors in Portland and Salem both reported extensive use, both in live and taped programs, of access by opposing sides. Both sides incorporated material that might have been perceived as sexually explicit.

Another topical instance was the Gulf War, where access cable was a rare site of dissent, including a series of programs by Deep Dish TV, which packages programs for cable access and transmits them by satellite. This programming was typically controversial. For instance, in Winsted, CT, the Mad River TV access service weathered demands to remove anti-Gulf War programming while it was being cablecast. A production group in Portland, OR, The Flying Focus Video Collective, has taken controversial stands on issues ranging from the Gulf War to local environmental issues.

—programs reflecting the point of view of cultural minorities. For instance, young people eagerly use access cable both to speak to their own peers and to speak about an experience underrepresented in mainstream media. A program wildly popular with teenagers, *Silly Goose*, was for a season a weekly comedy program in at least arguable and certainly adolescent taste in Defiance, OH. (Director Norm Compton recalled one episode that featured the theme of running with scissors.) Other regular local programs in that area that promoted youth culture on access were *Musical Mayhem*, featuring music videos, and *Hard Hits*, a rap show produced by a young African-American man. Similarly, in Olympia, WA, a youth-oriented music video program, *Mosher's Mayhem*, accounts for both a passionate teen audience and also the bulk of the occasional complaints to the service. In Grand Rapids, MI, *Blackwatch* focuses on the language and images of inner city youth. Malden, MA's public access has weathered controversy over youthful productions marked by vulgar language.

—programs that experiment with the form and otherwise stake a claim to art. Such programs have become controversial in Sacramento, Amherst, Davis, CA, Arlington, VA, and on Washington, D.C.'s DCTV system, and have been a perennial source of contention in public access.

In general, then, taped programming regularly appears on public access in ways that simultaneously serve the central mandate of the service and also offend some sensibilities.

LIVE PROGRAMMING

Live programming on public access reveals the social utility of potentially offensive programming in sometimes dramatic ways. Live programming can only be halted with a delay system beyond the budget of most access centers; it can only be dependably safe if both subject and participants can be counted on to avoid the extremes of opinion that presently characterize public access.

Most centers surveyed offer live and interactive programming, and find it draws eager participation from viewers. Access center directors highlighted various kinds of programming demonstrating

the role of access cable an a public forum, which might be in jeopardy under a gatekeeping arrangement:

—sexual and health education. This is an area where live programming often draws an engaged, often young audience. In Chicago, *AIDS Call-in Live* receives phone calls four-fifths of which come from African-American youth, according to director Barbara Popovic. Typical of the kind of interchange was the phone call of one 17-year-old girl who wanted to know how to respond to a boyfriend who assured her they need not use condoms because he was "loyal" to her. The conversation was frank and colloquial on both sides, while also giving the girl much needed information. As well, on air, speakers hold up items such as condoms and dental dams, and explain their use. On public access cable in Austin, TX, a program called *Midnight Whispers* frankly encourages viewers to call in to share their sexual fantasies, so that an on-air nurse can respond to them and discuss safe sex practices. The Portland, OR "AIDS Forum Live" similarly might raise concern. A Tucson program, *Bridges*, by and for the disabled, has featured AIDS education involving anatomical models. In Sacramento, the monthly "Health in America" program on alternative and holistic health options, has featured graphic image of women with mastectomies and damaged breast implants. The director of the Defiance, OH, center (which also carries government and educational programming) even wonders what might happen to city council meetings if, for instance, anti-pornography groups appear.

—topical call-in programs. For instance, in Sacramento within hours of the Rodney King verdict a special edition of the weekly *Live Wire* community call-in program was airing, with scores of viewers, most apparently African-American, responding to a host known in the community for his success in working with alienated youth. Although the staff found that the discussion was less raw than expected, it was also a volatile moment. Programs such as Fort Wayne, IN's program *Speak Out* and Tucson's *You're the Expert* touch on controversial local issues ranging from street signs to police behavior, without any way of predicting how callers might behave. NDC community TV in West St. Paul aired a series *Facts not Friends* around 1992 electoral politics, which the access director

saw as expanding the debate. In South Portland, ME, during the Gulf War, participants suggested illegal actions as protest.

—minority cultures. The Fort Wayne, IN program *Coalition for Unlearning Racism*, a live twice-a-month program, deals with topics on which, as access manager Rick Hayes puts it, "people are already irate," and has been the site of heated discussion about racism. Hayes values it not because he thinks it changes the minds of extremists, but because public dialogue, including with extremists, educates the community. Also on the same system is a program *Message to the Black Man*, a black nationalist program that purveys a distinctly minoritarian view in Fort Wayne. In Tucson, teenagers produce a live program called *The Forbidden Zone*, in which they talk in the slang and curse-laden jargon of their peers, involving sexually explicit language and sometimes addressing illegal activities such as drug use. It is also a rare public forum for this cohort; teenagers are far more likely to be the targets of mass media and advertisers' attention than they are to be producers. Similarly, the live teen show *Active Butch/Pensive Willy* in Newton Highlands, MA, has with its raw language in call-ins roused the ire of a board member.

Access directors often singled out live programming as of particular interest to their audience. "Live material like *AIDS Call-in Live* is what's best in access," said Chicago director Barbara Popovic. "If this can't be on, then it's the baby and the bathwater."

PRESCREEING AND BANNING PROGRAMMING

Most access centers surveyed do not prescreen at all, except, as in the case of Washington, D.C. and Dayton (OH) Access Television, a high speed run-through for technical quality. In fact, in one case, that of Somerville (MA) Community Access TV, the present community-run nonprofit began in response to outrage over the cable-run access center's prescreening of tapes. A few do prescreen, sampling programming for technical quality and content. In these cases (e.g., Prince George's Community Television, Landover, MD; Pittsburgh Community Television, Pittsburgh, PA) estimates of time it now takes to do prescreening range from 10 to

18 hours a week; however, this prescreening is not currently done under the constraints of the new law.

Exceptions demonstrate a balancing of concern for family viewing hours with the service's open access policy. In Fairfax, VA, the center prescreens to decide on when to schedule. In Vail, CO, director Suzanne Silverthorn watches "anything that might be in question," while in Amherst Myra Lenburg looks at unsolicited material. Since this kind of prescreening does not need to be comprehensive, it is also a light administrative burden. In Olympia, WA, as in several other access centers including Somerville, there was no prescreening, but producers were given information on guidelines developed in conjunction with the city or cable operator, to place potentially offensive programs on late at night. Many access centers have guidelines and require producers to read guidelines and certify that they abide by them.

Public access directors do become adept at dealing with complaints from viewers, and from city and cable officials. But rarely, in these interviews, had complaints resulted in prohibition of programming, and then usually after it had already run at least once.

Among several reported incidents of attempted programming intervention, two point up the importance of an independent public forum on controversial political issues. For instance, one Cincinnati channel accepted a tape from one political party in 1991 local elections; the other party promptly obtained a restraining order, although it had the right to air a program, and furthermore center staff had volunteered to help produce one. Ultimately, the complaining party lost in court, and the tape was aired. In the small town of Defiance, Ohio, several years ago town officials attempted — again, unsuccessfully — to block a program criticizing the town's plan to privatize emergency medical services.

The two other reported cases involve questions of taste and decency. In Columbus, Ohio, in Sept 1992 the city, which controls transmission from the independent nonprofit center, responded to complaints about frontal nudity in a program on gays and AIDS by dropping the program after it had run. Upon legal consultation,

however, the city reversed its decision because the program could not be considered pornography.

In an ongoing case in Sacramento, the incident appears part of a larger struggle between the center, the city, and the cable company. The cable company representative has seized upon a viewer complaint about a videoplay, *Dinosaurs*, and eagerly argued for shutting down the independently-run center to the city, which allocates its funds. Written and produced by a young local man, the play involved scenes of nudity and sexual aggression as part of the author's social critique. (The center's attorney advised the center the piece was not obscene.) Center director Ron Cooper recalls that the local cable operator, long a grudging supporter of the service, recently warned him that he would "shut you down" and that he had the approval of the multi-system owner to take the case to court.

EXPANDING SPEECH

Calls for banning sometimes result in reasoned accommodation such as the guidelines devised by the aldermanic and cable boards in Somerville, MA. Those guidelines then are given directly to producers. Sometimes, they can act as a powerful threat. When a program by and for teenagers, *Streetwatch*, ran on Columbus Community Cable Access several years ago and frank sexual language offended city officials enough to pull the program from rotation briefly, the board was badly shaken. "When government taps you on the shoulder and tries to crush it at the same time, you take notice," recalled center director Carl Kucharski. He notes that several board members, whose corporations did business with the city, felt particularly vulnerable to official discontent. The board contemplated over a period of months ways to prescreen programming, but could not find a workable arrangement.

Currently access center directors confront controversy by encouraging more speech, not only by allowing all voices a hearing but also by encouraging complainants to make use of training and production assistance, and by explaining the philosophy of the access center. This process appears to expand the forum for speech, not only for producers but for viewers, who may call in.

At Malden (MA) Access TV, director Rika Walsh recalled a program made by local youths in summer 1992 with "what was to my taste and probably yours an excessive amount of profanity." After the program, the center scheduled a two hour call-in, which was vigorously used. For Walsh, "That's what public access is all about—creating that public space. It allows the community to speak to issues; it's not just about the programming itself."

At Waycross Community TV in Forest Park, Ohio, director Greg Vawtar pointed to response to a racial hate text message posted on a nearby suburban system. Several of his access center's board members composed and aired passionate arguments against intolerance, part of a community-wide electronic conversation. Director Rick Hayes of the Fort Wayne, IN library system's public access channel noted that a well-established twice-weekly program, *Coalition for Unlearning Racism*, supported by the local NAACP and Urban League among others, began as a response to the possibility of carrying the Ku Klux Klan's *Race and Reason* (which never did run). Making the program also brought together nine groups that hitherto had not worked jointly.

COST OF PRESCREENING

The provisions on prohibition of programming and liability for obscene material in the 1992 Act would change the terms of PEG access dramatically. Implementing prohibitions such as the law now permits might involve, as the Federal Communications Commission has suggested (U.S. FCC 1992, p. 7), certifications to the operator. These would seem to necessitate some kind of prescreening or pre-emptive judgment on the safety of certain kinds of programming.

Aside from the question of mandate, in practical terms how would a requirement to certify and thus prescreen programming affect the current practice of access centers? Access center directors estimated typically that between a day a week and two full-time staff jobs would be required to prescreen and assess programming for the channel. (Some systems generate more than 3,500 program hours a year.) All but one estimated it would delay programming. No directors suggested it was possible to increase budgets in a difficult economic period, and all suggested that the

job would be done by someone at or near the top, usually themselves. Hap Haasch of Ann Arbor Community Access TV noted, "The real cost is not having staff available for almost a third of the work week."

The cost would thus be measured in terms of lost production assistance, training, and community outreach—in short, a crippling of the service itself. One director in Fitchburg, MA, called the time required "devastating to our already busy schedule."

In nine cases (Anderson Community TV, Cincinnati, OH; Winthrop, MA; Salina, KS; Holland, MI; Turner's Falls, MA; Ann Arbor, MI; Grand Rapids, MI; Fort Wayne, IN; Forest Park, OH; Glenview, IL) directors said they would probably have to drop all live programming. In others, such as Cincinnati Community Video, some live programming would be eliminated.

"There is not enough staff to supervise call-in lines or audio, control guests on programs or distinguish between 'safe' and 'dangerous' programs," wrote the director for Winthrop (MA) Community Access TV. Thus, he noted, programs of indisputable value might be lost. For instance, on October 30, 1991, when a terrible storm swept the area, the cable service provided seven hours of live coverage, giving information about street closings, flooding, evacuation routes and emergency shelters. Such programming, he suggested, would be eliminated along with all other live programming under certification or prescreening arrangements.

In Cincinnati, OH, Intercommunity Cable Regulatory Commission official Patricia Havlik said, "We'd probably have to drop the public access program—we can't afford to prescreen, we have no facilities or staff for it."

Access directors have evolved a variety of mechanisms to deal with first-amendment rights conflicts, which appear to have worked fairly well. The process has renewed their commitment to public access as a broad public forum, open even to repugnant speech. Several access directors, when asked to estimate the cost of implementing some screening process, initially refused to entertain the idea, responding with remarks like "I'd quit first," and "I'd go

into another line of work." The access director for Mad River TV, of Winsted, CT, wrote in answer to a question about the cost of prescreening, "Impossible to budget—we just wouldn't do it." Their attitudes appear reinforced by the record of broadly diverse programming that has a unique venue in public access.

The 1984 Act provides for viewers who reject such a forum. Lock boxes or the consumer option of blocking the channel was required by the Act, for access as well as for commercial channels, and would appear, from this survey, to be widely available. In the 31 interviews conducted, all but one person, who did not know, said the system had the capacity. In two cases, directors interviewed said that the company either appeared unwilling to block the channel or simply did not make public the ability to do so. In the 30 written surveys, 24 reported lockboxes available, although one said that they were not available for public access. By contrast, introducing editorial control over public access could, on the basis of access center directors' experience, violate the central concept of access cable.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIME WARNER ENTERTAINMENT COMPANY, L.P., Plaintiff,	)	
-against-	)	Civ. No.____
FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, Defendants.	)	

AFFIDAVIT OF JOSEPH J. COLLINS

STATE OF CONNECTICUT)
) ss:
COUNTY OF FAIRFIELD)

Joseph J. Collins, being duly sworn, deposes and states as follows:

1. I am Chairman and Chief Executive Officer of Time Warner Cable ("TWC"), an unincorporated division of Time Warner Entertainment Company, L.P. ("TWE").

* * *

D. The Leased Access Provisions of the 1992 and 1984 Cable Acts

28. Section 612 of the 1984 Cable Act (codified at 47 U.S.C. § 532) requires Cable operators to set aside a substantial portion—up to 15 percent—of their channels for lease to unaffiliated programmers (the "leased access provisions"). Section 612 also provides *inter alia*, that "a cable operator shall not exercise any editorial control over any video programming provided pursuant to this section".

29. As originally enacted, Section 638 of the 1984 Cable Act exempted cable operators from criminal and civil liability with respect to obscene matters that they were compelled to carry on PEG or leased access channels. Section 10(d) of the 1992 Cable Act amends Section 638 so as to eliminate this exemption from criminal and civil liability if a program "involves obscene material".

30. Thus, under Section 638 as amended, a cable operator is exposed to criminal prosecution or civil liability as to obscene programming created by others that the PEG and leased access provisions require the operator to carry. Section 10(a) of the 1992 Cable Act purports to resolve this problem with respect to leased access programming by amending § 612(h) of the 1984 Act to permit a cable operator to prohibit or restrict indecent matter on leased access channels. This power does not extend to PEG programming. As to leased access programming, it requires the cable operator to risk civil liability to an aggrieved leased access programmer, or criminal or civil liability under obscenity laws, if its decisions on obscenity should later be determined to have been incorrect. As to PEG programming the operator cannot even attempt to protect itself from such liability.

31. Neither the 1992 Cable Act nor any other law imposes leased access requirements upon SMATV or MMDS systems, DBS operators or other providers of video programming.

* * *

35. In addition, by subjecting providers of DBS service to far less stringent PEG requirements than cable operators are subjected to under the 1984 Cable Act, the 1992 Cable Act causes irreparable injury to TWC's cable systems by placing them at a competitive disadvantage by favoring DBS speech over TWC'S. TWC is also placed at a competitive disadvantage because neither the 1992 Cable Act, the 1984 Cable Act, nor any other law requires other providers of video programming, including SMATV and MMDS systems and broadcast television stations, to provide PEG channels.

36. The leased access provisions compel TWC to publish the speech of others. These provisions expressly abrogate the editorial discretion of TWC's cable systems and force TWC to be identified with messages it does not wish to convey.

37. The provision of Section 10(d) of the 1992 Cable Act which repeals the immunity from criminal and civil liability with respect to obscene programming carried on PEG and leased access channels causes irreparable injury to TWC by subjecting it to the risk of criminal and civil liability for programming created by others that it does not wish to carry but is required by law to carry. The Provisions of Section 612(h) of the Cable Act permitting TWC to prohibit or restrict obscene programming does not alleviate such injury in that they compel TWC to determine obscenity questions that even Federal courts regard as exceedingly difficult, and TWC remains exposed to criminal or civil liability if a court later disagrees with its determination. Further, these provisions provide no protection whatever as to obscene programming TWC may be required to carry on PEG channels. At least one TWC cable system has already been obligated to hire employees to screen programs for obscenity, even though it did not choose to offer these programs, and would prefer not to do so.

38. By compelling TWC to yield control of a substantial portion of its capacity to unaffiliated programmers, the leased access provisions irreparably injure TWC by impairing its ability to offer programming created by others or by itself that it would prefer to convey and that TWC believes its viewers would prefer and by limiting its ability to offer its own programming.

* * *

Subscription Omitted

Letterhead of InterMedia Partners

David G. Rozzelle
General Partner

November 13, 1992

Sam Behrend
Executive Director
Tucson Community Cable Corp.
124 East Broadway
Tucson, AZ 85702

Dear Sam:

Pursuant to Section 10 of the Cable Television Consumer Protection And Competition Act of 1992, the immunity conferred on Tucson CableVision by Section 638 of the Communications Act for the carriage of obscene programming on public, educational and governmental access channels will be repealed as of December 4, 1992. Accordingly, our lawyers advise us that we face potential civil and criminal liability for any obscene material carried on Channel 12.

Therefore, I must reluctantly request that all programming which contains sexual, excretory or other behavior or depictions, or language which potentially may be offensive to the citizens of Tucson be sent to our system for screening *before* it is cablecast by TCCC over our cable system. Moreover, no live programming should be cablecast which contains such material. All such programming should be taped and sent to us for screening as outlined above. Failure to adhere to this request will result in legal action by us seeking to prevent reoccurrence.

I personally believe that the present arrangement between the City, TCCC and the system is the best way to operate a public

access channel. That view is clearly not shared by our elected representatives and Tucson CableVision cannot permit itself to be liable for program content which is the exclusive province of a third party. I am hopeful you will understand the conundrum in which we find ourselves.

I will be in Tucson the week of December 7. I would like to meet with you during the week if you have the time.

Very truly yours

David G. Rozzelle
Chief Executive Officer,
Cable Operations

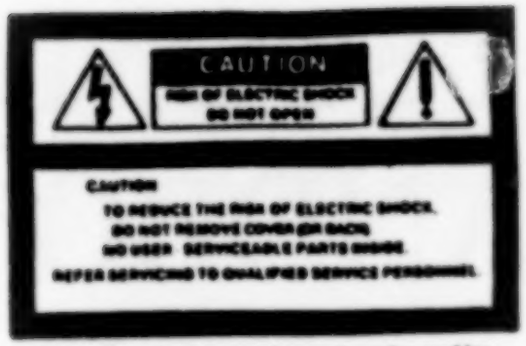
cc: Clayton Hamilton
Brad Detrick, Esq.
Alan Mutter
Wendell Owen

CUSTOMER HANDBOOK

Jerrold IMPULSE 7000

Model DP71**, DPV72** and DPBB73**
Addressable Converters

GENERAL



Graphical symbols and supplemental warning marking located on bottom of converter.

WARNING: TO PREVENT FIRE OR SHOCK HAZARD, DO NOT EXPOSE THIS APPLIANCE TO RAIN OR MOISTURE.

The lightning flash with arrowhead symbol, within an equilateral triangle, is intended to alert the user to the presence of uninsulated "dangerous voltage" within the product's enclosure that may be of sufficient magnitude to constitute a risk of electric shock to persons.

The exclamation point within an equilateral triangle is intended to alert the user to the presence of important operating and maintenance (servicing) instructions in the literature accompanying the appliance.

This installation should be made by a qualified service person and should conform to all local codes.

REPAIR: If you find the unit in need of repair, contact your cable system operator for repair or replacement.

NOTE TO CATV SYSTEM INSTALLER:
This reminder is provided to call the CATV system installer's attention to Article 820-22 of the NEC that provides guidelines for proper grounding and, in particular, specifies that the cable ground shall be connected to the grounding system of the building, as close to the point of cable entry as practical.

IMPORTANT SAFEGUARDS

1. READ INSTRUCTIONS — All the safety and operating instructions should be read before the appliance is operated.

2. RETAIN INSTRUCTIONS — The safety and operating instructions should be retained for future reference.

3. HEED WARNINGS — All warnings on the appliance and in the operating instructions should be adhered to.

4. FOLLOW INSTRUCTIONS — All operating and use instructions should be followed.

5. CLEANING — Unplug this video product from the wall outlet before cleaning. Do not use liquid cleaners or aerosol cleaners. Use a damp cloth for cleaning.

6. ATTACHMENTS — Do not use attachments not recommended as they may cause hazards.

7. WATER AND MOISTURE — Do not use this equipment near water — for example, near a bath tub, wash bowl, kitchen sink, or laundry tub, in a wet basement, or near a swimming pool, and the like.

8. ACCESSORIES — Do not place this video product on an unstable cart, stand, tripod, bracket, or table. The video product may fall, causing serious injury and serious damage to the appliance. Use only with a cart, stand, tripod, bracket, or table recommended by the manufacturer, or sold with equipment. Any mounting of the appliance should follow the manufacturer's instructions, and should use a mounting accessory recommended by the manufacturer.

9. VENTILATION — Slots and openings in the cabinet are provided for ventilation and to ensure reliable operation of the equipment and to protect it from overheating. The openings should never be blocked by placing the video product on a bed, sofa, rug, or other similar surface. Equipment should never be placed near or over a radiator or heat register, or in a built-in installation such as a bookcase or rack unless proper ventilation is provided.

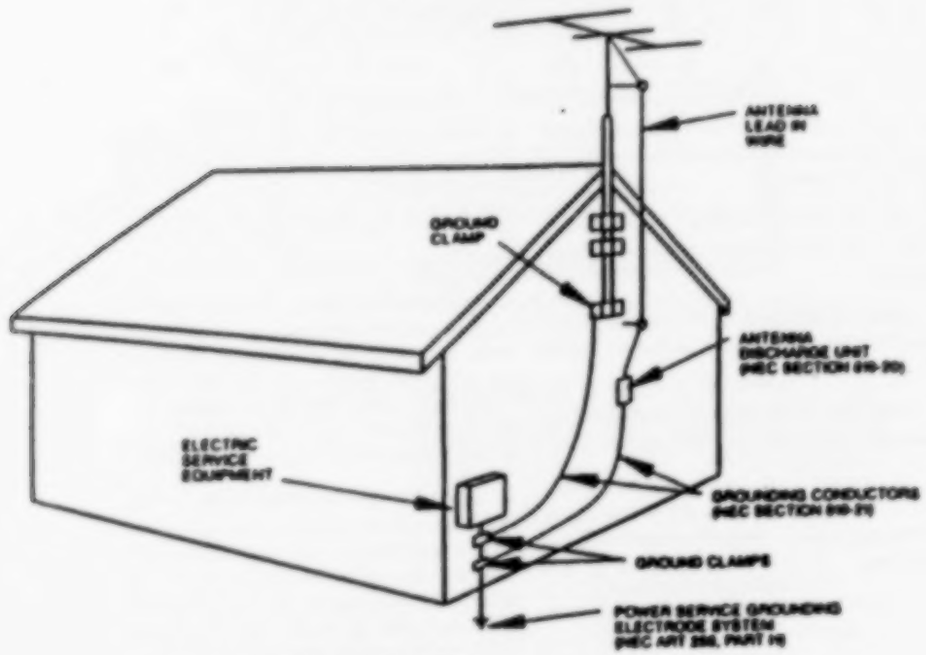
10. POWER SOURCES — This video product should be operated only from the type of power source indicated on the marking label. If you are not sure of the type of power supplied to your home, consult your local power company. For equipment intended to operate from battery power, or other sources, refer to the operating instructions.

11. GROUND OR POLARIZATION — This equipment may be equipped with a polarized alternating-current line plug (a plug having one blade wider than the other). This plug will fit into the power outlet only one way. This is a safety feature. If you are unable to insert the plug fully into the outlet, try reversing the plug. If the plug should still fail to fit, contact your electrician to replace your obsolete outlet. Do not defeat the safety purpose of the polarized plug.

ALTERNATE WARNINGS — This equipment may be equipped with a 3-wire grounding-type plug, a plug having a third (grounding) pin. This plug will only fit into a grounding-type power outlet. This is a safety feature. If you are unable to insert the plug into the outlet, contact your electrician to replace your obsolete outlet. Do not defeat the safety purpose of the grounding-type plug.

12. POWER-CORD PROTECTION — Power supply cords should be routed so that they are not likely to be walked on or pinched by items placed upon or against them, paying particular attention to cords at plugs, convenience receptacles, and the point where they exit from the appliance.

FIGURE 75 1
EXAMPLE OF ANTENNA GROUNDING



NEC – NATIONAL ELECTRICAL CODE

FIGURE 1

43 OUTDOOR ANTENNA GROUNDING
If an outside antenna or cable system is connected to the equipment, be sure the antenna or cable system is grounded so as to provide some protection against voltage surges and built-up static charges. Section 810 of the National Electrical Code, ANSI/NFPA No. 70-1984, provides information with respect to proper grounding of the lead in wire to an antenna discharge unit, size of grounding conductors, location of antenna-discharge unit, connection to grounding electrodes, and requirements for the grounding electrode. See Figure 1.

14. LIGHTNING For added protection for this equipment during a lightning storm, or when it is left unattended and unused for long periods of time, unplug it from the wall outlet and disconnect the antenna or cable system. This will prevent damage to the video product due to lightning and power-line surges.

15. POWER LINES An outside antenna system should not be located in the vicinity of overhead power lines or where it can fall into such power lines or circuits. When installing an outside antenna system, extreme care should be taken to keep from touching such power lines or circuits as contact with them may be fatal.

16. OVERLOADING Do not overload wall outlets and extension cords as this can result in a risk of fire or electrical shock.

17. OBJECT AND LIQUID ENTRY - Never push objects of any kind into this equipment through openings as they may touch dangerous voltage points or short-out parts that could result in a fire or electric shock. Never spill liquid of any kind on the video product.

18. SERVICING – Do not attempt to service this equipment yourself as opening or removing covers may expose you to dangerous voltage or other hazards. refer all servicing to qualified service personnel.

19. DAMAGE REQUIRING SERVICE— Unplug this equipment from the wall outlet and refer servicing to qualified service personnel under the following conditions:

a. When the power-supply cord or plug is damaged.

b. If liquid has been spilled, or objects have fall into the equipment.

c. If the equipment has been exposed to rain water.

d. If the equipment does not operate normally f following the operating instructions. Adj only those controls that are covered by t operating instructions as an improper adjustment of other controls may result in dama and will often require extensive work by qualified technician to restore the equipm to its normal operation.

e. If the equipment has been dropped or the cabin has been damaged.

f. When the equipment exhibits a distinct chan in performance, indicating a need for service

20. REPLACEMENT PARTS – When replacement parts are required, be sure the servi technician has used replacement parts specified t the manufacturer or have the same characteristi as the original part. Unauthorized substitutions ma result in fire, electric shock or other hazards.

21. SAFETY CHECK – Upon completion of an service or repairs to this video product, ask th service technical to perform safety checks t determine that the video product is in prop operation condition.

TABLE OF CONTENTS

Operating Suggestions 1
Converter 3
Converter Controls 4
Converter Indicators 5
Remote Control and Channel Selection 6
Favorite Channel Operation 7
Sleep Timer Feature 8
Remote Control and Volume Control 9
Parental Control - Deactivation 10
Parental Control - Channel Selection 11
Parental Control - Activation 12
Parental Control - Choosing a Code 13
Parental Control - Changing a Code 15
Time Controlled Programming 16
Purchasing a Future Program or Event 19
Time Controlled Programming - Operating Notes and Suggestions 20
Remote Control and Battery Replacement 23
Accessing Impulse Services 24
Purchasing a Current Program or Service 25
The Purchase Code 26
Entering a Purchase Code 27
Changing a Purchase Code 28
Erasing a Purchase Code 29
Responding to an Opinion Poll 30
Error Codes 31

The material in this publication is for information purposes only and is subject to change without notice

Your new IMPULSE 7000 converter features the latest technology applicable to cable TV viewing. These instructions were prepared to acquaint you with the operation of IMPULSE 7000. Please read this information carefully. It will help you to get the maximum enjoyment from this product and will give you a better understanding of its application for your cable TV system and your home video and audio system needs.

OPERATING SUGGESTIONS

1 Aim the remote control directly at the converter. Be sure there are no obstructions between the remote control and the converter.

2 Press and release buttons one at a time, firmly and deliberately.

3 Be sure the TV set is tuned to the converter channel (CH 2, 3 or 4). Your cable installer will tell you which channel to tune.

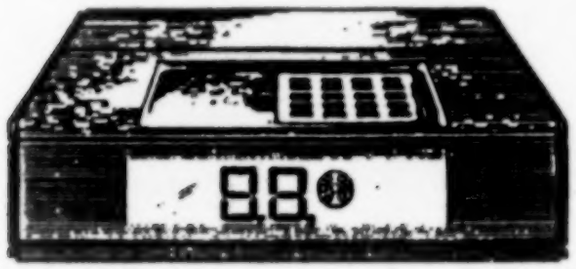
OPERATING SUGGESTIONS

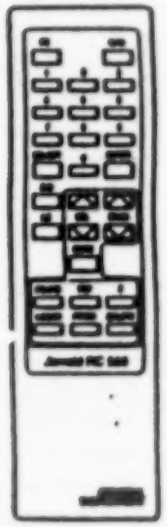
4 Place the converter on a smooth, flat surface. Air should circulate freely under and around the converter. DO NOT place anything on top of the converter.

5 If the display flickers and the converter will not change channels, unplug the converter from the 117 Vac wall outlet, wait ten seconds or longer plug the converter in again and press the ON/OFF key to turn the converter on again.

6 If channels can be changed with the converter buttons, but not with the remote control, check the battery. If the battery is weak or dead, replace it.

CONVERTER



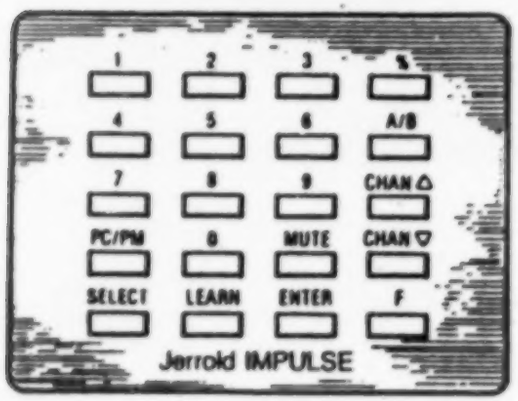


The IMPULSE 7000 converter has been provided by your cable operator to enhance your cable viewing pleasure. It contains a number of features to give you greater convenience in home entertainment.

Among the many features are remote control capability, parental control, favorite channel programming, last channel recall, and attractive styling that is sure to match any decor. Twenty buttons are provided on the top of the converter and corresponding buttons are included on the handheld unit so you have the option of direct or remote channel entry.

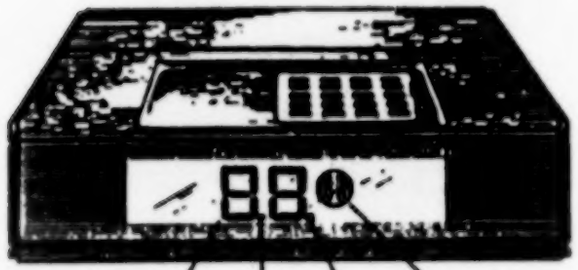
Be sure to read this customer handbook, noting the use of all the features of your new IMPULSE 7000 converter and its remote control.

CONVERTER CONTROLS



The keys on the converter keypad control the same functions as the like keys on the remote control unit. Refer to the following pages for details.

CONVERTER INDICATORS



CHANNEL INDICATOR

Shows cable channel selected.
Do not block or place objects in front of this area.

P

PARENTAL CONTROL INDICATOR

Lights when channel currently tuned is selected for parental control.

B

CABLE INDICATOR

(Only applicable when unit is equipped with an A/B switch.)

If the unit is equipped with an A/B switch, this indicator lights when cable B is selected; it does not light when cable A is selected. In a dual cable system, it will light when cable B is selected. In a single cable system, it will light when an alternate source is selected.

REMOTE CONTROL AND CHANNEL SELECTION

NUMERIC KEYS

Press two keys, one at a time, to select channel.

Examples: 10
06

FC

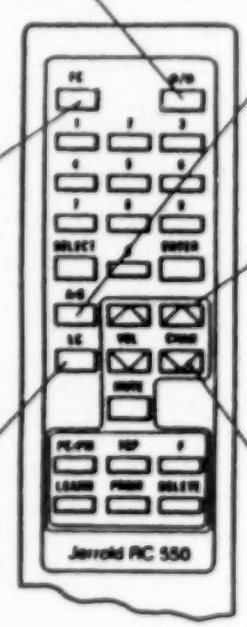
FAVORITE CHANNEL RECALL

Press to step through favorite channels.

LC

LAST CHANNEL RECALL

Press once to recall last channel tuned. Press again to return to current channel.



I/O

ON/OFF

Press once to turn converter on. Press again to turn off.

A/B

Dual Cable System:
Press to switch between cables.

Single Cable System:
Press to switch between converter and VCR (if applicable).

CHAN

CHANNEL UP

Press and release to select next higher channel. Press and hold to scan upward.

CHAN

CHANNEL DOWN

Press and release to select next lower channel. Press and hold to scan downward.

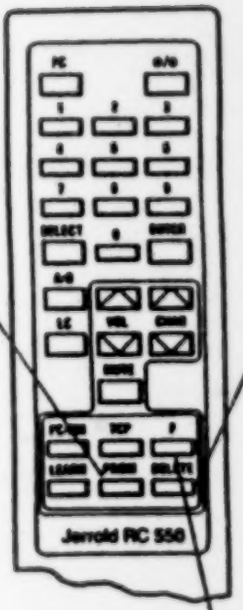
FAVORITE CHANNEL OPERATION

TO ADD A CHANNEL

1. Tune to the channel desired.
2. Press PRGM.
3. The channel is now a favorite channel.

TO REMOVE A CHANNEL

1. Tune to the channel desired
2. Press DELETE
3. The channel is no longer a favorite channel.



TO SCAN FAVORITE CHANNELS

Press FC to step to next higher favorite channel.

TO REMOVE ALL FAVORITE CHANNELS

1. Press F.
2. Press DELETE
3. There are no longer any favorite channels.

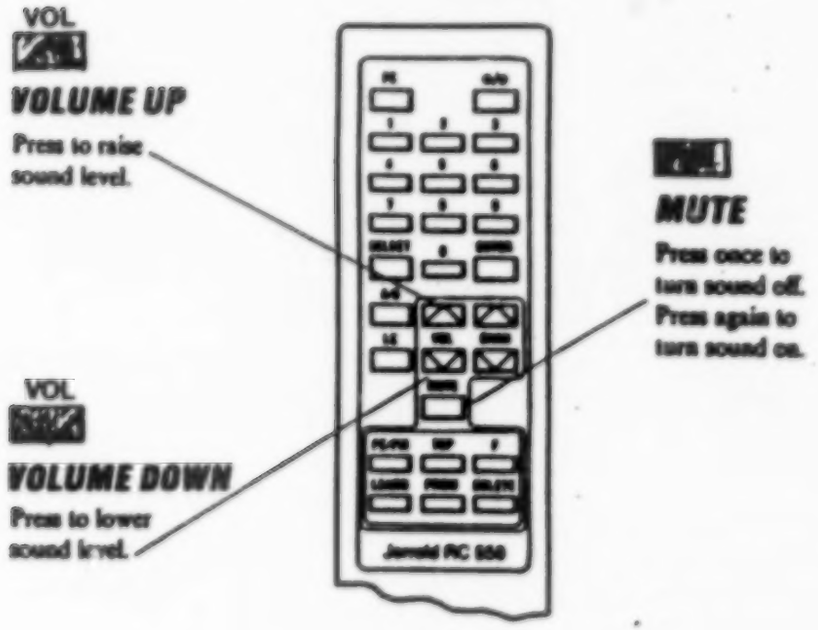
SLEEP TIMER FEATURE

This feature allows the subscriber to program the converter to turn-off after a selected time interval has expired. Using the 'F' and 'PRGM' keys, the subscriber can program the converter to shut-off after a sleep-timer interval of 30, 60, or 90 minutes as described below.

ACTION	CONVERTER DISPLAY	COMMENT
1 Press F, then PRGM.	00	
2 Press PRGM again to select the desired sleep-timer interval. Press once for 90 minutes, twice for 60 minutes, and three times for 30 minutes.	90	
3 Press ENTER to start the sleep-timer countdown. (Selected channel is displayed) *Any break in the above sequence will cause the converter to revert to the current channel display and will not enable the sleep-timer.*	12	Converter will shut-off after 90 minutes. *Press F, PRGM, then ENTER to disable the sleep-timer after it has been enabled.*

REMOTE CONTROL AND VOLUME CONTROL

Model DP71** does not offer volume control. Check underside of converter for model name.



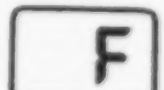
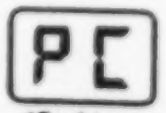
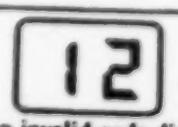
NOTES

To set volume control level initially:

1. Press "F" then "mute" on handheld. This sequence will adjust the converter to a level that will provide maximum separation on a stereo signal.
2. Raise TV volume to maximum comfort level.
3. Sound volume can now be adjusted to any desired level from the remote control unit.

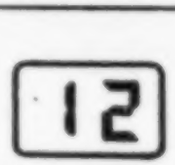
PARENTAL CONTROL DEACTIVATION

Since the unit is automatically placed into parental control when turned on, parental control must first be deactivated before selecting parental control channels or before programming a parental control code.

ACTION	CONVERTER DISPLAY
1 Press F	
2 Press PC/PM	 *(flashing)*
3 Enter parental control code (If code is not programmed in, go directly to step 4. See page 12 for programming.)	
4 Press ENTER	
The channel number will appear on the converter display and the channel can now be added or deleted from the parental control list.	Entering an invalid code displays a "P1" message. Three unsuccessful attempts to enter a valid code displays a "P2" message and disables parental control for 15 minutes.

PARENTAL CONTROL CHANNEL SELECTION

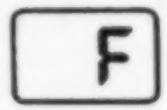
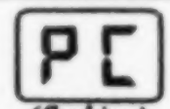
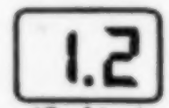
When unit is turned on, parental control is automatically activated. In order to select channels for parental control, the control must first be deactivated. See page 10.

ACTION	CONVERTER DISPLAY
1 Tune the channel which is to be parentally controlled (for example channel 12).	
2 Press PC/PM The "P" indicator on the display will light. If the unit displays "PL", the unit is locked. The unit must be unlocked prior to programming. (see page 9)	
3 Repeat steps 1 and 2 for all desired parentally controlled channels.	

PARENTAL CONTROL ACTIVATION

The unit can be locked by either turning the unit off and then on or by following the instructions below:

Select channels to be controlled (see page 11).

ACTION	CONVERTER DISPLAY
1 Press F	
2 Press PC/PM	
3 Press ENTER	 *(flashing)*
Converter display will alternate between PC and the channel selected 1.2. This occurs for all parentally controlled channels.	 *(flashing)*

PARENTAL CONTROL
CHOOSING PARENTAL CONTROL CODE

In order to fully secure the parental control feature, the subscriber may wish to choose and program a parental control code into the converter. This capability allows the subscriber to "teach" the converter a code which then must be used to remove parental controls. Again, parental control must be deactivated prior to code programming (page 10).

ENTER PARENTAL CONTROL CODE

ACTION	CONVERTER DISPLAY
1 Press LEARN LEARN	LE
2 Press PC/PM PC/PM	LP

Continued

PARENTAL CONTROL CODE

Continued

ACTION	CONVERTER DISPLAY
3 Press ENTER ENTER	LP *(flashing)*
4 Enter code (up to 4 digits)	LP *(remains flashing)*
5 Press ENTER ENTER (Selected channel is displayed.)	1.2
Any break in the above sequence will cause the converter to revert to the current channel display.	

The code you select can be any number from 0 to 9999 but cannot exceed four digits. If the code selected exceeds four digits, the converter will recognize only the last four digits ——d. If ——orgel—— pare——ontr——e, ca——l ——

PARENTAL CONTROL
CHANGING PARENTAL CONTROL CODE

ACTION	CONVERTER DISPLAY
1 Press LEARN LEARN	LE
2 Press PC/PM PC/PM	LP
3 Enter old code	LP
4 Press ENTER ENTER	LP *(flashing)*
5 Enter new code	LP *(remains flashing)*
6 Press ENTER ENTER (selected channel is displayed.) Any entry error in the above sequence will cause the converter to return to the current channel display	1.2

TIME CONTROLLED PROGRAMMING

This feature allows the subscriber to program the converter for unattended VCR recording. The unit can be programmed to switch to a predetermined channel at a predetermined time and date. Once the unit has been programmed it need not be turned on prior to leaving the home. However, the unit MUST be plugged into a wall outlet; do not plug into a switched outlet.

In the following example, the converter will be programmed for:

Date: 28th
Time: 12:30 p.m.
Channel: 32

TO PROGRAM

ACTION	CONVERTER DISPLAY	COMMENT
1 Press TCP TCP	d 1	d = Day of Month 1 = First event
2 Enter date of event (i.e. 28th of month). See notes for everyday programming. 2 8	-2 28	

Continued

ACTION	CONVERTER DISPLAY	COMMENT
3 Press ENTER ENTER	h 1	Unit is now programmed for the 28th. h = Hour of day 1 = First event
4 Enter hour of event to be programmed. 1 2	- 1 12	
5 Switch between AM and PM via PC/PM button. Notice P indicator on display. PC/PM	1, 2	Without P indicates AM P ON= PM P OFF = AM
6 Press ENTER ENTER	n 1	Unit is now programmed for 12 PM on the 28th. n = minutes 1 = first event
7 Enter minutes of event 3 0	- 3 30	

Continued

ACTION	CONVERTER DISPLAY	COMMENT
8 Press ENTER ENTER	c 1	Unit is now programmed for 12:30 PM on the 28th. c = channel 1 = first event
9 Enter channel of event Switch between A and B cable Via A/B button. Notice B indicator on display. 3 2	- 3 32	B ON = B cable B OFF = A cable
FOR PURCHASING A FUTURE PROGRAM OR EVENT, GO TO PAGE 19		
10 Press ENTER ENTER	d 2	Unit is now programmed to switch to channel 32 at 12:30 PM on the 28th of the month. d = day of month 2 = second event
11 At this point, the above steps are repeated for events 2 - 8.		
12 To exit Time Controlled Programming Press TCP	Current channel	

PURCHASING A FUTURE PROGRAM OR EVENT

Use the following sequence to program the converter for purchasing an event with unattended recording.

CONTINUED FROM STEP 9 PAGE 26

ACTION	CONVERTER DISPLAY	COMMENT
9a Press SELECT	E -	Indicates EVENT programming.
9b Enter your PURCHASE CODE (if code is not programmed, go directly to step 9c. See page 27 for programming a code.)	E -	Display changes in intensity with each digit entered.
9c Press ENTER	32 *(flashing)*	Channel number should be flashing. If it is not flashing the purchase was not allowed.
10 Press ENTER again	d2	Prepurchase via TCP has been programmed. Continue with next event programming or exit TCP mode.

TIME CONTROLLED PROGRAMMING

TCP

OPERATING NOTES AND SUGGESTIONS

GENERAL INFORMATION
All single-digit entries must be preceded by a 0. That is, channel 6 is entered as 06, the 7th of the month is entered as 07.

While in TCP mode, depressing anything other than a NUMBER, SELECT or ENTER will cause the TCP mode to be aborted without retaining programming for this particular slot. If this occurs, simply re-enter the TCP mode via the TCP button and step back to desired programming via the ENTER button, or the + or − button.

If no entry is made while in the TCP programming mode within 40 seconds, the TCP mode will be aborted and the user will be returned to normal converter operation.

No parameters are entered into memory until the ENTER button has been depressed and the next prompt has been displayed.

The subscriber can, at any time, review the TCP entries by pressing TCP then pressing ENTER or + or − in order to step through and review the currently programmed TCP parameters. Pressing TCP again will return the subscriber to normal operation without affecting the TCP entries.

A single-day entry which has been programmed into the TCP memory will be erased from the TCP memory after it has been executed. For this reason TCP will not be activated the same day of the next month unless the unit is reprogrammed to do so.

After a TCP slot has been programmed for a future event purchase, the SELECT and ENTER sequence must be repeated if any changes are made in the event programming entries.

To cancel an event from TCP, simply press DELETE after calling up the event prompt (d1, d2, etc.) on the display.

PARENTAL CONTROL AND TCP

If the subscriber attempts to program a channel currently Parentally Controlled into TCP the converter will display 'PL'. This means the channel the subscriber has chosen to program into TCP is currently locked-out via Parental Control. In order to program this channel into TCP the subscriber must first exit TCP by pressing the 'TCP' Button. Once TCP has been exited the subscriber can deactivate Parental Control by following the instructions on page 9.

Now that the converter is unlocked the subscriber can reenter TCP by pressing the 'TCP' Button and program the unit with the desired information.

Now that the unit is programmed and TCP has been exited the subscriber can relock all Parental Control Channels by following the instructions on Page 10.

NOTE: Even though the converter is now in Parental Control Lock Mode, all Parentally Controlled channels programmed into TCP will become viewable at the time and date programmed into that particular TCP slot. To prevent viewing of Parentally Controlled Channels after an event, program the converter to turn off using the instructions under "Convenience Outlet Programming" on page 22.

DISABLING REMOTE ON CONVERTER

If the subscriber is using two converters, one for normal television viewing and the other for VCR recording, he may wish to disable the remote control capability on the recording converter. By doing so the subscriber can operate the viewing converter with the remote control without affecting the recording converter.

The subscriber can disable the remote control capability by pressing LEARN then ⏻/O, being careful to aim the remote control at the converter to be disabled; LO will appear on the converter display to indicate lock out. To restore the remote control capability, the subscriber again presses LEARN and ⏻/O; the LO indication will disappear from the display and the unit will be in the normal operating mode. Any set-top key depression also disables LO. '.

AUDIO QUALITY

To assure quality audio during TCP recording, press F then MUTE (V̲) before turning the converter off. When the F button is pressed the letter F will be displayed on the converter. When the MUTE button is pressed the display will indicate the current channel. The audio is now set for maximum recording quality.

Continued

EVERYDAY PROGRAMMING

Any single programming slot can be programmed to activate everyday (e.g., tune to channel 3 everyday at 2:00 PM); enter 00 for the day.

Day (00 cannot be entered when setting up a future event purchase (a P3 error code will be displayed)

CONVENIENCE OUTLET PROGRAMMING

The convenience outlet on the rear of the converter can be programmed to switch on and off through TCP. When the subscriber wishes to do this they simply program in the date and time they wish the converter outlet to turn on or off. The subscriber then uses the ⏻/O button in the channel slot to toggle between outlet on and outlet off. The on or off condition is designated by a "on" or "of" on the converter display.

CONVERTER PARAMETERS

In the following, # refers to any particular TCP program slot. All entry slots have an upper and lower limit. If the entry attempted falls outside of these limitations, the terminal will prompt the user again with the appropriate symbol (i.e., if a day outside of the range 00 - 31 is attempted and the user depresses ENTER, the d# symbol will reappear prompting the user to again attempt the entry).

ENTRY SLOT		ALLOWABLE RANGE	COMMENTS
DAY	d#	00 - 31	00 = every day – = unused slot
HOUR	h#	01 - 12	
MINUTE	n#	00 - 59	
CHANNEL	c#	Terminal dependent	

REMOTE CONTROL AND BATTERY REPLACEMENT

MODEL RC-550

The battery used is a 9-volt, rectangular battery, NEDA type 1604 or equivalent. Available at most retail stores.

1. Squeeze and lift the locking tab to remove battery compartment cover.
2. Remove old battery.
3. Snap new battery onto connector.
4. Place battery into compartment and replace cover.

MODEL MRC-550

The MRC-550 uses two 1.5-volt, IEC type R03 (AAA) batteries or equivalent. Available at most retail stores.

1. Slide the battery compartment cover in the direction of the arrow.
2. Remove old batteries and replace with new ones.
3. Align battery compartment cover in tracks and slide upwards until it snaps into place.

ACCESSING IMPULSE SERVICES

Jerrold Impulse 7000 Series

STARFONE™ and STARVUE™

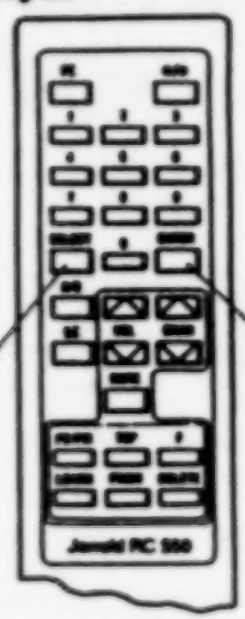
Two-way Converters

The instructions on the following pages are for accessing Impulse services. They pertain to subscribers who have been supplied by their cable system operators with a converter that includes a two-way module. If you are not sure that your converter has such a module, contact your cable operator.

PURCHASING A CURRENT PROGRAM OR SERVICE

For Purchasing a Future Program or Event See Page 16.

When a channel carrying a special program or event which must be purchased separately is selected, an "E" will blink alternately with the channel number on the converter display. The TV will display either a preview of the program selected, if that is in progress, or a barker channel message, until a purchase is made. To purchase the program:—



1 Press and release the SELECT* key.

2 Press and release numeric keys corresponding to your purchase code. SEE NOTE below.

3 Press and release the ENTER key and observe on converter the channel number on continuous display. If the display continues to blink, the purchase has not succeeded and the program cannot be viewed.

NOTE
Omit step 2 if you are not using a purchase code.

Entering an invalid purchase code causes a "P1" message to be displayed on the converter until another key entry is made. Three successive false or unsuccessful attempts to enter a valid purchase code will disable the EVENT key for fifteen minutes and display the "P2" message. See page 31 for error codes.

THE PURCHASE CODE

The PURCHASE CODE is any number of your choice from 1 to 9999.

The number is your secret code and it is optional.

The purpose of the code is to deny (as for example to minor children) the ability to purchase programs without your authorization.

You "teach" your converter your chosen code and the converter stores it in memory. You may:—

1 Enter your code in your converter.

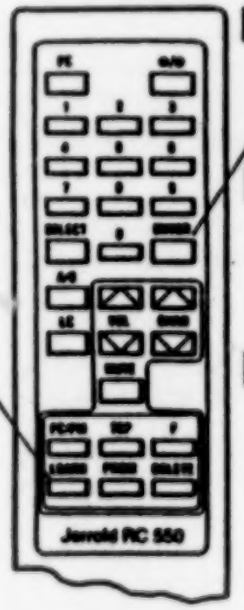
2 Change a previously entered code to a new code.

3 Erase a previously entered code and purchase programs without a code.

REMEMBER YOU CAN IGNORE THE PURCHASE CODE IF YOU WISH

ENTERING A PURCHASE CODE

To enter your PURCHASE CODE:—



1 Press and release the LEARN key and notice the message "LE" on the converter display.

2 Press and release the ENTER key and notice the "LE" message blinking. The converter is ready to accept your code.

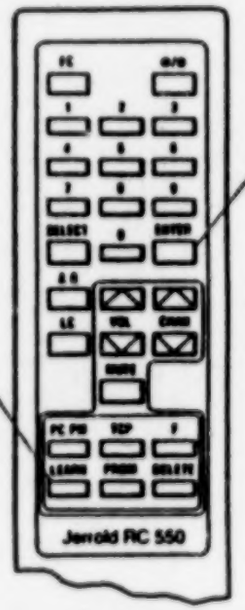
3 Press and release the numeric keys to enter your code (1 to 9999). If more than four digits are entered the converter recognizes only the last four.

4 Press and release the ENTER key and notice the "LE" message disappears. Your code is now stored in the converter memory.

NOTE
If the "LE" message fails to blink, a code cannot be entered. If in step 4 the "LE" fails to disappear, your code has not been stored in the converter and you should try again.

CHANGING A PURCHASE CODE

To change a PURCHASE CODE:—



1 Press and release the LEARN key and notice the "LE" message on the converter display.

2 Press and release the numeric keys to enter your present code.

3 Press and release the ENTER key and notice the "LE" message is blinking. Converter is ready to accept a new code.

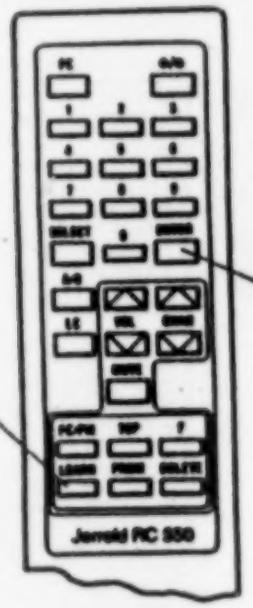
4 Press and release the numeric keys to enter your new code.

5 Press and release the ENTER key and notice the "LE" message disappears. A new code is now stored in the converter memory.

NOTE
Three successive false or unsuccessful attempts to change the purchase code displays the message "P2" and disables the LEARN key for fifteen minutes.

ERASING A PURCHASE CODE

To erase a PURCHASE CODE:—



1 Press and release the LEARN key and notice the "LE" message on the converter display.

2 Press and release the numeric keys to enter your present code.

3 Press and release the ENTER key twice and notice that the "LE" message disappears.

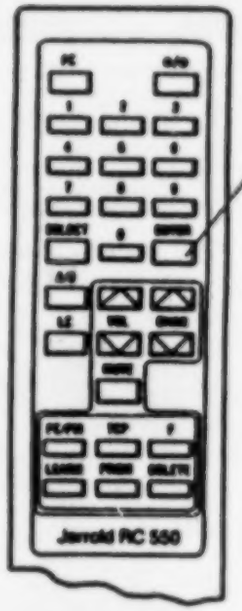
NOTE
Three successive false or unsuccessful attempts to erase a purchase code disables the LEARN key for fifteen minutes and displays the message "P2".

If you have lost or cannot remember your purchase code, you may call your cable company and ask to have your code erased. This request will be followed shortly by a blinking "LE" message on your converter display. When this message is displayed, press and release the ENTER key. The "LE" message will disappear to indicate that your purchase code has been erased.

RESPONDING TO AN OPINION POLL

When you have tuned to a channel on which an opinion poll is in progress, you may choose to participate. When a response to a question is requested, an "r" message blinks to indicate that the converter is ready to accept a response. You respond by:—

1 Entering a number between 1 and 255.



2 Press and release the ENTER key and observe the channel number on display.

If more than three digits are entered, the converter recognizes the last three digits only. If the response is valid the "r" message disappears, indicating that the response has been accepted. If a number larger than 255 is entered, the response is invalid and the "r" message continues to blink.

Pressing any key other than a numeric key or the ENTER key, while the "r" message is blinking will:

1. Remove the "r" message from the display.
2. Nullify any response in progress.
3. Cause the converter to respond to the new command and terminate your participation in current opinion poll.

ERROR CODES

When entry errors have been made or you have selected a disallowed function, an error code appears on your converter display. These codes and the message they convey are:—

CODE	MESSAGE
P1	Wrong secret code
P2	Select or Learn key disabled (penalty timer running)
P3	Everyday prepurchase by TCP not allowed
P4	Credit limit exceeded
P5	Transaction table full
P6	Not used
P7	Credit limit is zero
P8	Valid time stamp not received
P9	Event cannot be purchased

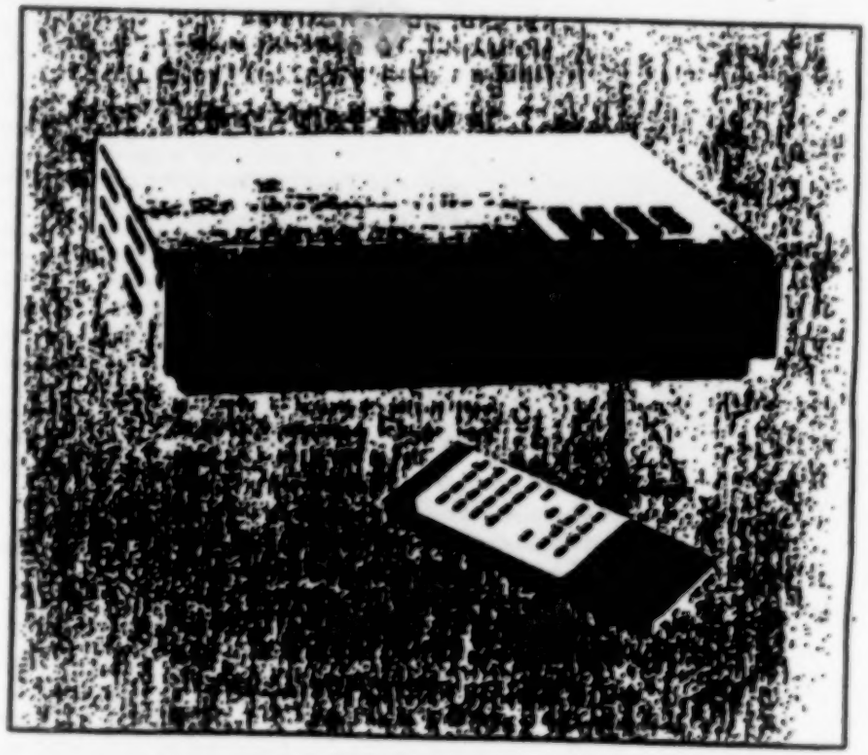
NOTICE

Converters equipped with the STARFONE option are connected to your telephone line. If you don't hear the dial tone over your telephone try the following tests: hang up and try again in a few seconds; disconnect the converter cable connecting to the telephone wall outlet and try again. If there is still no dial tone contact your telephone company. If you are assured by the telephone company that their service is normal and still cannot get a dial tone, contact your cable company and report a defective

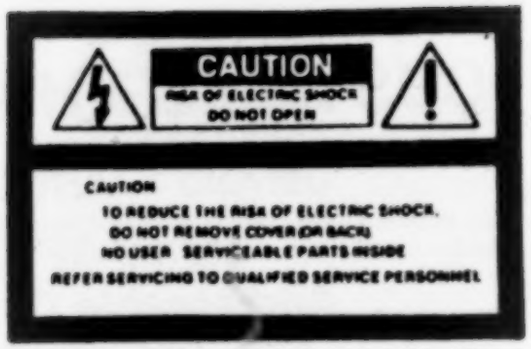
CUSTOMER HANDBOOK

Jerrold STARCOM® VI

Model DPV5-*
Addressable Converter
With Volume Control



GENERAL INSTRUMENT



Graphical symbols and supplemental warning marking located on bottom of converter.

WARNING: TO PREVENT FIRE OR SHOCK HAZARD, DO NOT EXPOSE THIS APPLIANCE TO RAIN OR MOISTURE.

The lightning flash with arrowhead symbol, within an equilateral triangle, is intended to alert the user to the presence of uninsulated "dangerous voltage" within the product's enclosure that may be of sufficient magnitude to constitute a risk of electric shock to persons.

The exclamation point within an equilateral triangle is intended to alert the user to the presence of important operating and maintenance (servicing) instructions in the literature accompanying the appliance.

This installation should be made by a qualified service person and should conform to all local codes.

REPAIR: If you find the unit in need of repair, contact your cable system operator for repair or replacement.

NOTE TO CATV SYSTEM INSTALLER:
This reminder is provided to call the CATV system installer's attention to Article 820-22 of the NEC that provides guidelines for proper grounding and, in particular, specifies that the cable ground shall be connected to the grounding system of the building, as close to the point of cable entry as practical.

TABLE OF CONTENTS

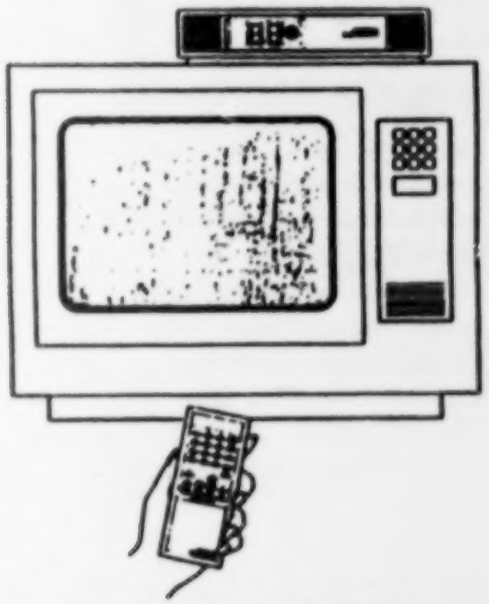
Operating Suggestions	1
Converter	2
Converter Controls	3
Converter Indicators	4
Remote Control and Channel Selection	5
Remote Control and Volume Control	6
Parental Control Selection	7
Parental Control Activation *(Plunger Type)*	8
Parental Control Deletion *(Plunger Type)*	9
Parental Control Activation *Clasp Type)*	10
Parental Control Deletion *(Clasp Type)*	11
Favorite Channel Operation	12
Remote Control and Battery Replacement	13

WELCOME

Your new STARCOM VI features the latest technology applicable to cable TV viewing. These instructions were prepared to acquaint you with the operation of STARCOM VI. Please read this information carefully. It will help you to get the maximum enjoyment from this product and will give you a better understanding of its application to your cable TV system and your home video and audio system needs.

The material in this publication is for information purposes only and is subject to change without notice.

OPERATING SUGGESTIONS



- Aim the remote control directly at the converter. Be sure there are no obstructions between the remote control and the converter.
- Press and release buttons one at a time, firmly and deliberately.
- Be sure the TV set is tuned to the converter channel (CH 2, 3, or 4). Your cable installer will tell you which channel to tune.
- Place the converter on a smooth, flat surface. Air should circulate freely under and around the converter. DO NOT place anything on top of the converter. Adequate cooling requires that the top of the converter be clear.
- If the display flickers and the converter will not change channels, unplug the converter from the 117 Vac wall outlet, wait ten seconds or longer, plug the converter in again, and press the ON/OFF key to turn the converter on again.
- If channels can be changed with the converter buttons, but not with the remote control, check the battery. If the battery is weak or dead, replace the battery.

CONVERTER

The STARCOM® VI Model DPV5-* converter has been provided by your cable operator to enhance your cable viewing pleasure. It contains a number of features to give you greater convenience in home entertainment.

Among the many features are remote control capability, parental control, favorite channel programming, last channel recall, and attractive styling that is sure to match any decor. Nineteen buttons are provided on the top of the converter and corresponding buttons are included on the handheld unit so you have the option of direct or remote channel entry.

Be sure to read this customer handbook, noting the use of all the features of your new STARCOM VI converter and its remote control.

CONVERTER CONTROLS

NUMERIC KEYS *(Shown in black)*

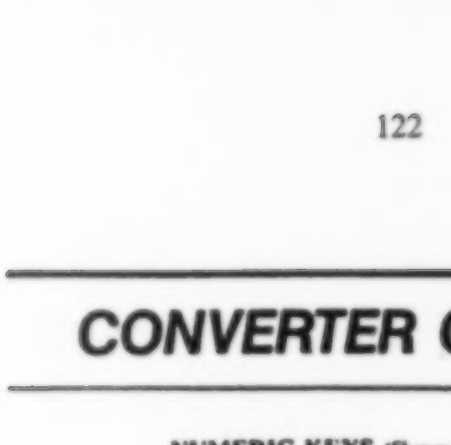
Press two keys, one at a time, to select channel.

Examples: 10
06

8/0 (ON/OFF)
Press once to turn converter on. Press again to turn off.

A/B
Dual Cable System:
Press to switch between cables.

Single Cable System:
Press to switch between converter and VCR (if applicable).



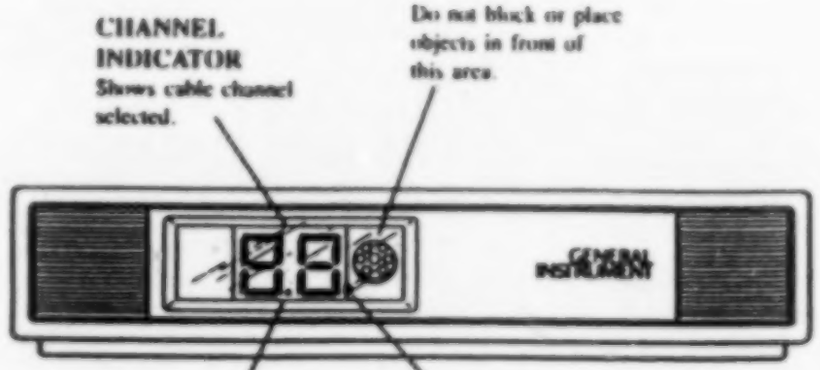
+ (CHANNEL UP)
Press and release to select next higher channel.
Press and hold to scan upward.

– (CHANNEL DOWN)
Press and release to select next lower channel.
Press and hold to scan downward.

CONVERTER INDICATORS

CHANNEL INDICATOR
Shows cable channel selected.

Do not block or place objects in front of this area.



PARENTAL CONTROL INDICATOR
Lights when channel currently tuned is selected for parental control.

CABLE INDICATOR
Lights when cable B is selected. Does not light when cable A is selected. In a dual cable system, this will light when cable B is selected. In a single cable system, this will light when the VCR is selected (if applicable).

REMOTE CONTROL AND CHANNEL SELECTION

NUMERIC KEYS
Press two keys, one at a time, to select channel.

Examples: 10
06

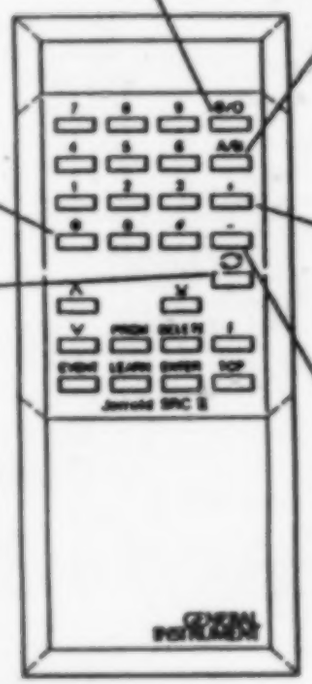
★ PARENTAL CONTROL
Used to select channels for parental control.

(LAST CHANNEL RECALL)
Press once to recall last channel tuned. Press again to return to current channel.

0/0 (ON/OFF)
Press once to turn converter on. Press again to turn off.

A/B
Dual Cable System:
Press to switch between cables.

Single Cable System:
Press to switch between converter and VCR (if applicable).



+ (CHANNEL UP)
Press and release to select next higher channel. Press and hold to scan upward.

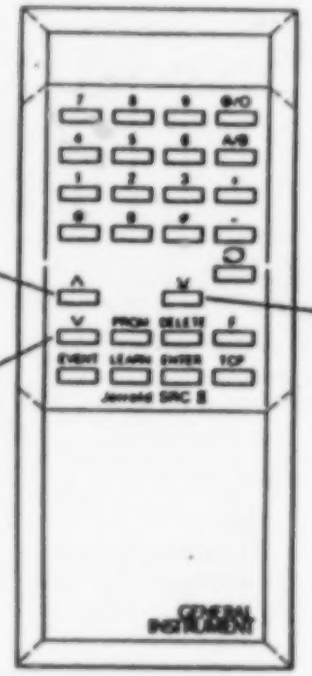
– (CHANNEL DOWN)
Press and release to select next lower channel. Press and hold to scan downward.

EVENT/LEARN/ENTER
(Shown shaded)
Used with Jerrold's STARFONE and STARVUE adapters. Pressing these buttons will have no effect on standard converter oper-

REMOTE CONTROL AND VOLUME CONTROL

∧(VOLUME UP)
Press to raise sound level.

∨(VOLUME DOWN)
Press to lower sound level.



⊻ (MUTE)
Press once to turn sound off. Press again to turn sound on.

NOTE

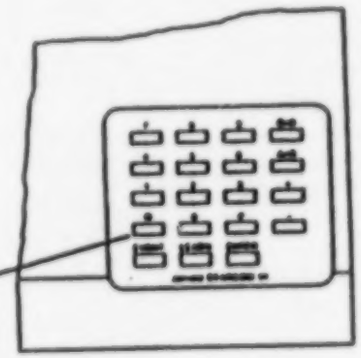
To set volume control level initially:

1. *Raise converter volume to maximum with remote control.*
2. *Raise TV volume to maximum comfort level.*

Sound volume can now be adjusted to any desired level from the remote control unit.

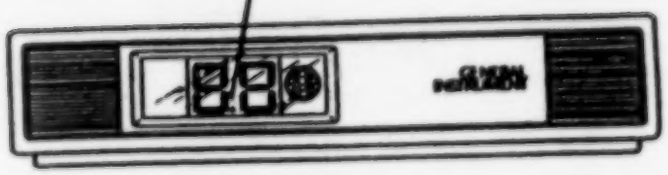
PARENTAL CONTROL SELECTION

1
Tune channel which is to be controlled.



2
Press ★ to select channel for parental control. *(Can also be set from remote control.)*

3
★ indicator will light.

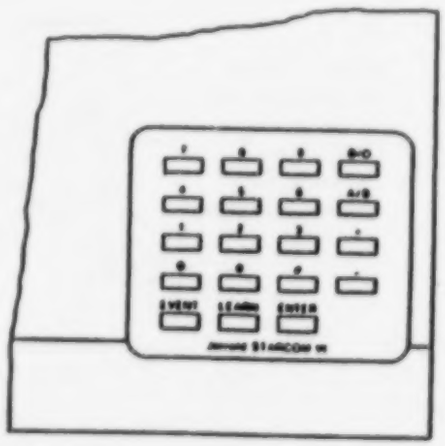


4
Repeat steps 1, 2, and 3 for all desired parentally controlled channels.

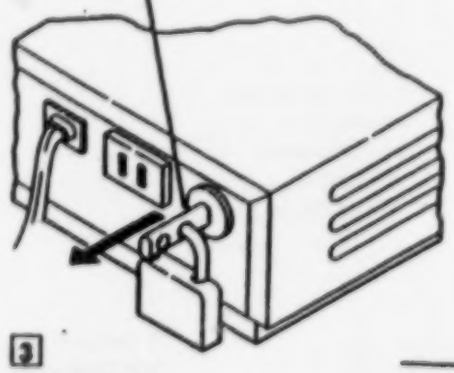
PARENTAL CONTROL ACTIVATION

Plunger Type

1
Select channels to be controlled *(see page 7)*.



2
Pull bar outward about 1/2 inch.



3
Pass shackle of padlock through inner hole.

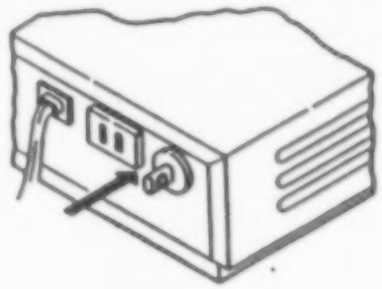
NOTE
User provides padlock with shackle diameter less than 1/4 inch.

PARENTAL CONTROL DELETION

Plunger Type

1

Remove padlock and check that bar on rear panel is retracted into converter. (Only one hole is exposed.)



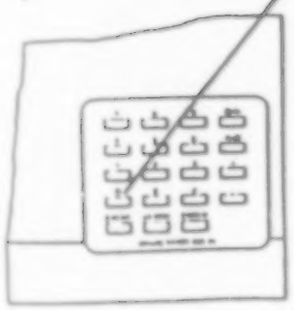
2

Tune channel which is to be uncontrolled.

★ indicator will be lit.

3

Press ★ to deselect channel for parental control. ★ indicator will go out.



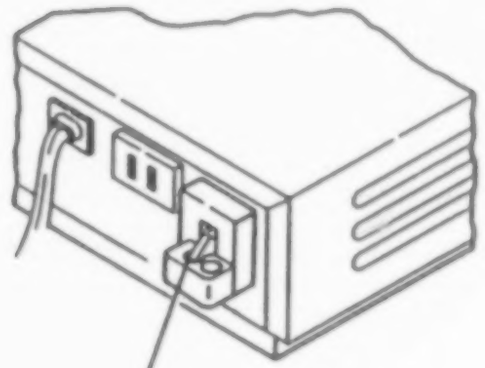
★ indicator will light only on channels which are selected for parental control.

PARENTAL CONTROL ACTIVATION

Clasp Type

1

Select channels to be controlled *(see page 7)*.



2

TO ACTIVATE PARENTAL CONTROL

User provides padlock with shackle diameter less than 1/4 inch.

3

Pass shackle of padlock through this hole.

4

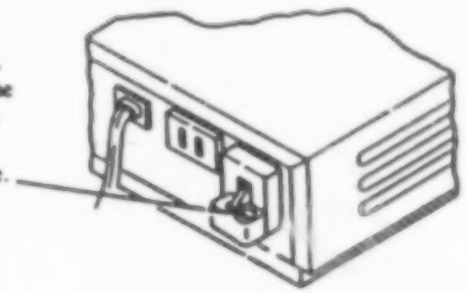
All previously designated parentally controlled channels are now locked OUT.

PARENTAL CONTROL DELETION

Clasp Type

1

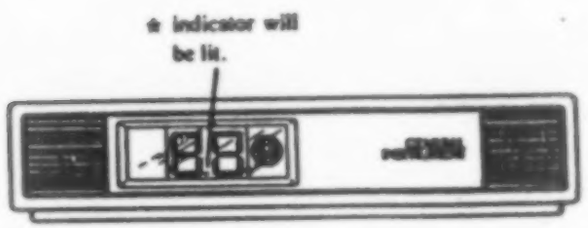
Remove padlock. You may store the padlock by passing the shackle through this hole.



2

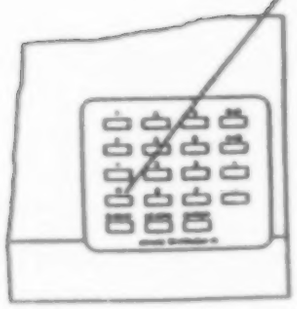
Tune channel which is to be uncontrolled.

★ indicator will be lit.



3

Press ★ to deselect channel for parental control. ★ indicator will go out.



★ indicator will light only on channels which are selected for parental control.

FAVORITE CHANNEL OPERATION

TO ADD A CHANNEL

1

Tune to the channel desired.

2

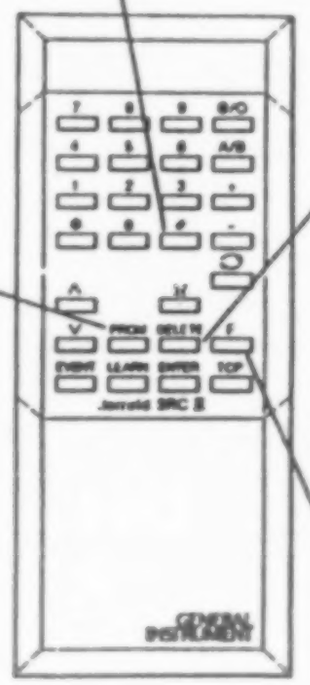
Press PRGM.

3

The channel is now a favorite channel.

TO SCAN FAVORITE CHANNELS

Press # to step to next higher favorite channel.



TO REMOVE A CHANNEL

1

Tune to the channel.

2

Press DELETE.

3

The channel is no longer a favorite channel.

TO REMOVE ALL FAVORITE CHANNELS

(Function available on some models only.)

1

Press F.

2

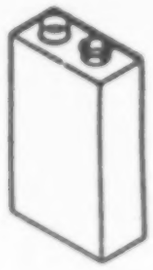
Press DELETE.

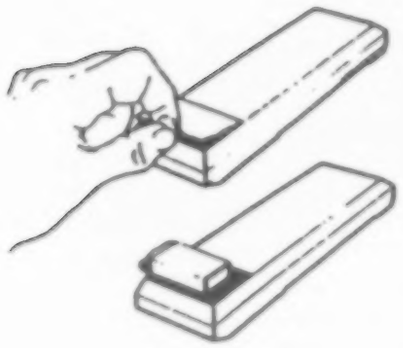
3

There are no longer any favorite channels.

REMOTE CONTROL AND BATTERY REPLACEMENT

The battery used is a 9-volt rectangular battery, NEDA type 1904 or equivalent.



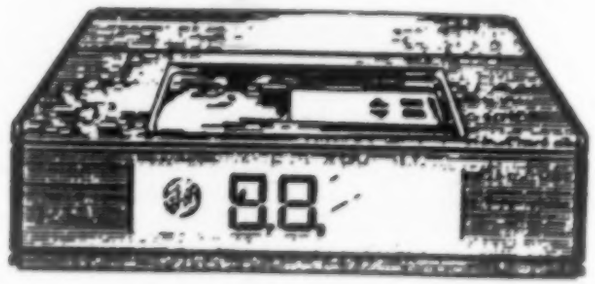


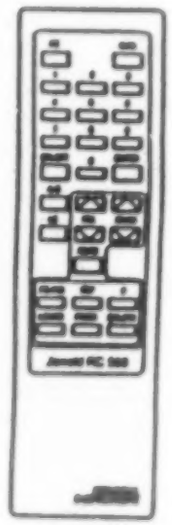
1. Use coin to flip off back cover.
2. Remove old battery.
3. Snap new battery onto connector.
4. Place battery in compartment and replace cover.

CUSTOMER HANDBOOK

Jerrold STARCOM® 7

Model DQN7-*
Digital Plain Converter





GENERAL INSTRUMENT

Graphical symbols and supplemental warning marking located on bottom of converter.

WARNING: TO PREVENT FIRE OR SHOCK HAZARD, DO NOT EXPOSE THIS APPLIANCE TO RAIN OR MOISTURE.

The lightning flash with arrowhead symbol, within an equilateral triangle, is intended to alert the user to the presence of uninsulated "dangerous voltage" within the product's enclosure that may be of sufficient magnitude to constitute a risk of electric shock to persons.

The exclamation point within an equilateral triangle is intended to alert the user to the presence of important operating and maintenance (servicing) instructions in the literature accompanying the appliance.

This installation should be made by a qualified service person and should conform to all local codes.

REPAIR: If you find the unit in need of repair, contact your cable system operator for repair or replacement.

NOTE TO CATV SYSTEM INSTALLER:
This reminder is provided to call the CATV system installer's attention to Article 820-22 of the NEC that provides guidelines for proper grounding and, in particular, specifies that the cable ground shall be connected to the grounding system of the building, as close to the point of cable entry as practical.

IMPORTANT SAFEGUARDS

1. READ INSTRUCTIONS – All the safety and operating instructions should be read before the appliance is operated.

2. RETAIN INSTRUCTIONS – The safety and operating instructions should be retained for future reference.

3. HEED WARNINGS – All warnings on the appliance and in the operating instructions should be adhered to.

4. FOLLOW INSTRUCTIONS – All operating and use instructions should be followed.

5. CLEANING – Unplug this video product from the wall outlet before cleaning. Do not use liquid cleaners or aerosol cleaners. Use a damp cloth for cleaning.

6. ATTACHMENTS – Do not use attachments not recommended as they may cause hazards.

7. WATER AND MOISTURE – Do not use this equipment near water – for example, near a bath tub, wash bowl, kitchen sink, or laundry tub, in a wet basement, or near a swimming pool, and the like.

8. ACCESSORIES – Do not place this video product on an unstable cart, stand, tripod, bracket, or table. The video product may fall, causing serious injury and serious damage to the appliance. Use only with a cart, stand, tripod, bracket, or table recommended by the manufacturer, or sold with equipment. Any mounting of the appliance should follow the manufacturer's instructions, and should use a mounting accessory recommended by the manufacturer.

9. VENTILATION – Slots and openings in the cabinet are provided for ventilation and to ensure reliable operation of the equipment and to protect it from overheating. The openings should never be blocked by placing the video product on a bed, sofa, rug, or other similar surface. Equipment should never be placed near or over a radiator or heat register, or in a built-in installation such as a bookcase or rack unless proper ventilation is provided.

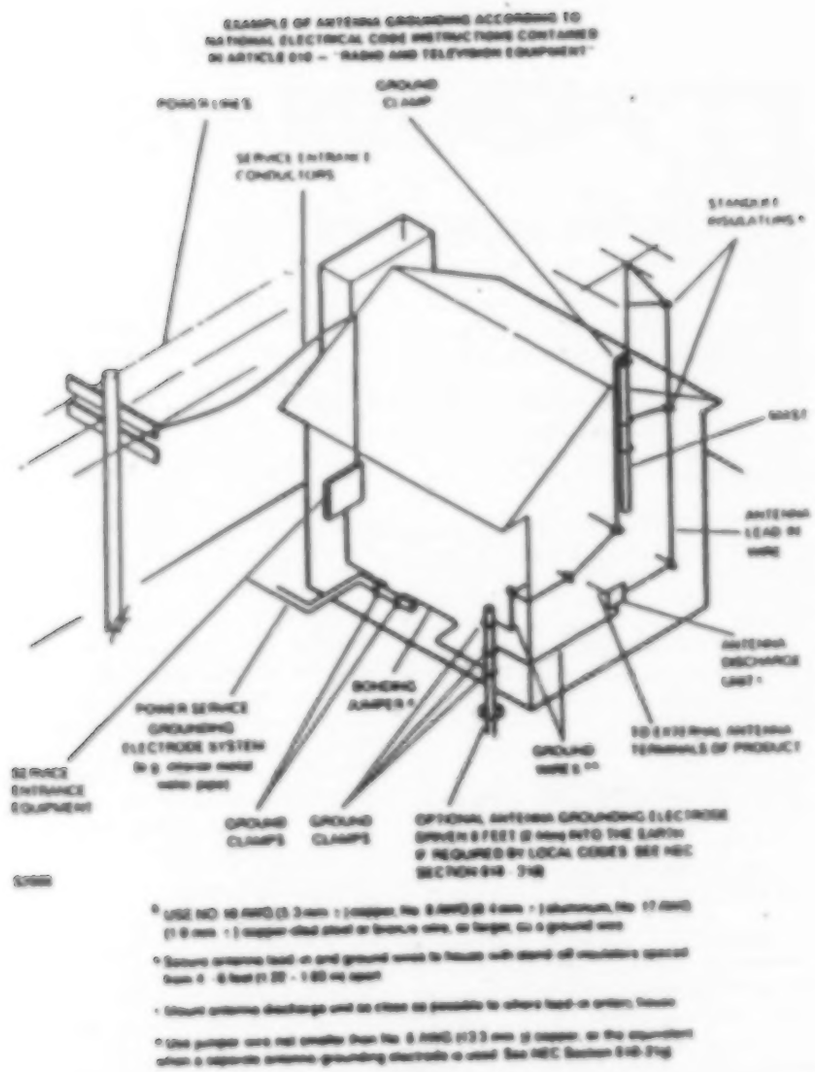
10. POWER SOURCES – This video product should be operated only from the type of power source indicated on the marking label. If you are not sure of the type of power supplied to your home, consult your local power company. For equipment intended to operate from battery power, or other sources, refer to the operating instructions.

11. GROUND OR POLARIZATION – This equipment may be equipped with a polarized alternating-current line plug (a plug having one blade wider than the other). This plug will fit into the power outlet only one way. This is a safety feature. If you are unable to insert the plug fully into the outlet, try reversing the plug. If the plug should still fail to fit, contact your electrician to replace your obsolete outlet. Do not defeat the safety purpose of the polarized plug.

ALTERNATE WARNINGS – This equipment may be equipped with a 3-wire grounding-type plug, a plug having a third (grounding) pin. This plug will only fit into a grounding-type power outlet. This is a safety feature. If you are unable to insert the plug into the outlet, contact your electrician to replace your obsolete outlet. Do not defeat the safety purpose of the grounding-type plug.

12. POWER-CORD PROTECTION – Power supply cords should be routed so that they are not likely to be walked on or pinched by items placed upon or against them, paying particular attention to cords at plugs, convenience receptacles, and the point where they exit from the appliance.

Continued



* USE NO. 10 AWG (5.3 mm) COPPER, NO. 8 AWG (8.4 mm) ALUMINUM, NO. 17 AWG (1.0 mm) COPPER-CLAD STEEL OR BRONZE WIRE, OR LARGER, AS A GROUND WIRE

* SECURE ANTENNA LEAD-IN AND GROUND WIRES TO HOUSE WITH STAND-OFF INSULATORS SPACED FROM 4 - 6 FEET (1.22 - 1.83 m) APART

* MOUNT ANTENNA DISCHARGE UNIT AS CLOSE AS POSSIBLE TO WHERE LEAD-IN WIRES ENTER HOUSE

* USE JUMPER WIRE NOT SMALLER THAN NO. 6 AWG (13.3 mm) COPPER, OR THE EQUIVALENT WHEN A SEPARATE ANTENNA GROUNDING ELECTRODE IS USED. SEE NEC SECTION 810-21(f)

FIGURE 1

13. OUTDOOR ANTENNA GROUNDING - If an outside antenna or cable system is connected to the equipment, be sure the antenna or cable system is grounded so as to provide some protection against voltage surges and built-up static charges. Section 810 of the National Electrical Code, ANSI/NFPA No. 70-1984, provides information with respect to proper grounding of the lead-in wire to an antenna discharge unit, size of grounding conductors, location of antenna-discharge unit, connection to grounding electrodes, and requirements for the grounding electrode. See Figure 1.

14. LIGHTNING - For added protection for this equipment during a lightning storm, or when it is left unattended and unused for long periods of time, unplug it from the wall outlet and disconnect the antenna or cable system. This will prevent damage to the video product due to lightning and power-line surges.

15. POWER LINES - An outside antenna system should not be located in the vicinity of overhead power lines or where it can fall into such power lines or circuits. When installing an outside antenna system, extreme care should be taken to keep from touching such power lines or circuits as contact with them may be fatal.

16. OVERLOADING - Do not overload wall outlets and extension cords as this can result in a risk of fire or electrical shock.

17. OBJECT AND LIQUID ENTRY - Never push objects of any kind into this equipment through openings as they may touch dangerous voltage points or short-out parts that could result in a fire or electric shock. Never spill liquid of any kind on the video product.

18. SERVICING - Do not attempt to service this equipment yourself as opening or removing covers may expose you to dangerous voltage or other hazards. Refer all servicing to qualified service personnel.

19. DAMAGE REQUIRING SERVICE - Unplug this equipment from the wall outlet and refer servicing to qualified service personnel under the following conditions:

a. When the power-supply cord or plug is damaged.

b. If liquid has been spilled, or objects have fallen into the equipment.

c. If the equipment has been exposed to rain or water.

d. If the equipment does not operate normally by following the operating instructions. Adjust only those controls that are covered by the operating instructions as an improper adjustment of other controls may result in damage and will often require extensive work by a qualified technician to restore the equipment to its normal operation.

e. If the equipment has been dropped or the cabinet has been damaged.

f. When the equipment exhibits a distinct change in performance, indicating a need for service.

20. REPLACEMENT PARTS - When replacement parts are required, be sure the service technician has used replacement parts specified by the manufacturer or have the same characteristics as the original part. Unauthorized substitutions may result in fire, electric shock or other hazards.

21. SAFETY CHECK - Upon completion of any service or repairs to this video product, ask the service technician to perform safety checks to determine that the video product is in proper operation condition.

Your new STARCOM 7 features the latest technology applicable to cable TV viewing. These instructions were prepared to acquaint you with the operation of STARCOM 7. Please read this information carefully. It will help you to get the maximum enjoyment from this product and will give you a better understanding of its application for your cable TV system and your home video and audio system needs.

TABLE OF CONTENTS

Operating Suggestions 1
Converter 3
Converter Controls 4
Converter Indicators 5
Remote Control and Channel Selection 6
Favorite Channel Operation 7
Parental Control—Channel Selection 8
Parental Control—Activation 9
Parental Control—Deletion 10
Parental Control—Set Override Code 11
Parental Control—Override 12
Remote Control—Battery Replacement 13

The material in this publication is for information purposes only and is subject to change without notice

OPERATING SUGGESTIONS

1

Place the converter on a smooth, flat surface. Air should circulate freely under and around the converter. DO NOT place anything on top of the converter. Adequate cooling requires that the top of the converter be clear.

2

Aim the remote control directly at the converter. Be sure there are no obstructions between the remote control and the converter.

3

Press and release buttons one at a time, firmly and deliberately.

OPERATING SUGGESTIONS

4

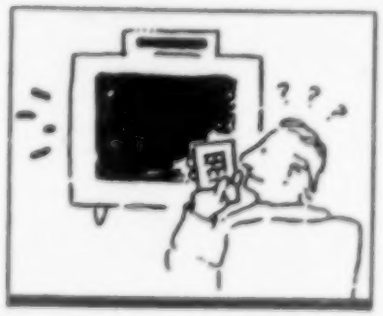
Be sure the TV set is tuned to the converter channel (CH 2, 3 or 4). Your cable installer will tell you which channel to tune.

5

If the display flickers and the converter will not change channels, unplug the converter from the 117 Vac wall outlet, wait ten seconds or longer, plug the converter in again and press the ON/OFF key to turn the converter on again.

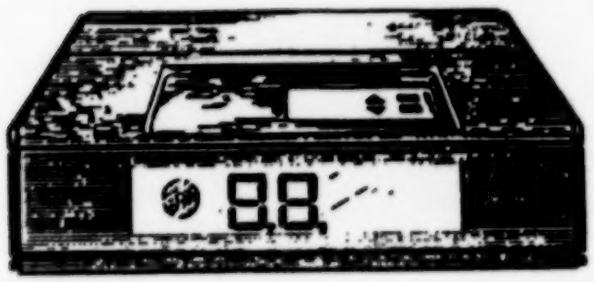
6

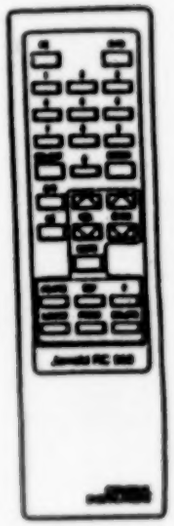
If channels can be changed with the converter buttons, but not with the remote control, check the battery. If the battery is weak or dead, replace it.



If a power outage should occur, or if the converter is unplugged, the converter memory will not "forget" which channels have been designated favorite channels and parental control channels. The converter will come back on to the last channel viewed.

CONVERTER



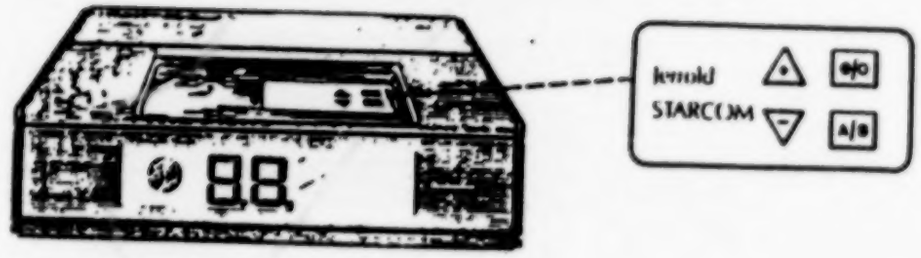


The STARCOM® 7 Model DQN7-* converter has been provided by your cable operator to enhance your cable viewing pleasure. It contains a number of features to give you greater convenience in home entertainment.

Among the many features are remote control capability, parental control, favorite channel programming, last channel recall, and attractive styling that is sure to match any decor. Four buttons are provided on the top of the converter and corresponding buttons are included on the remote control unit so you have the option of direct or remote control of the converter. The remote control unit also provides for control of additional features which cannot be controlled from the buttons on the converter.

Be sure to read this customer handbook, noting the use of all the features to your new STARCOM 7 converter and its remote control.

CONVERTER CONTROLS



CHANNEL UP

Press and release to select next higher channel.

Press and hold to scan upward.

ON/OFF

Press once to turn converter on.

Press again to turn converter off.

CHANNEL DOWN

Press and release to select next lower channel.

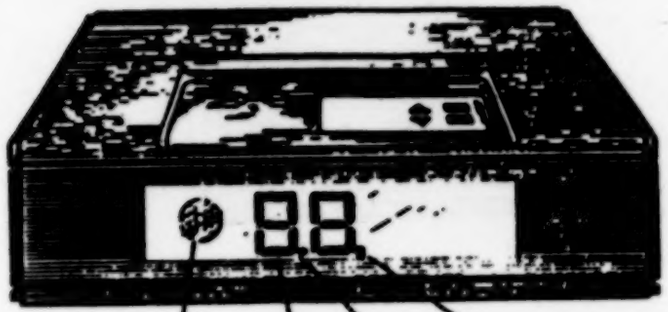
Press and hold to scan downward.

A/B

Dual Cable System:
Press to switch between cables.

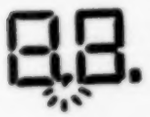
Single Cable System:
Press to switch between converter and VCR (if applicable).

CONVERTER INDICATORS



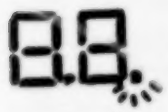
CHANNEL INDICATOR

Shows cable channel selected.
Do not block or place objects in front of this area.



PARENTAL CONTROL INDICATOR "P"

Lights when channel currently tuned is selected for parental control.



CABLE INDICATOR "B"

(Only applicable when unit is equipped with an A/B switch.)

If the unit is equipped with an A/B switch, this indicator lights when cable B is selected; it does not light when cable A is selected. In a dual cable system, it will light when cable B is selected. In a single cable system, it will light when an alternate source is selected.

REMOTE CONTROL AND CHANNEL SELECTION

NUMERIC KEYS

Press two keys, one at a time, to select channel. Examples: 06, 10 All single-digit entries must be preceded by a 0.

FAVORITE CHANNEL RECALL

Press to step through favorite channels.

ON/OFF

Press once to turn converter on. Press again to turn converter off.

Used to enter secret code into memory for Parental Control Override.

CHANNEL UP

Press and release to select next higher channel. Press and hold to scan upward.

CHANNEL DOWN

Press and release to select next lower channel. Press and hold to scan downward.

Used to set secret code for Parental Control Override and to unlock for override.

Dual Cable System: Press to switch between cables.
Single Cable System: Press to switch between converter and VCR (if applicable).

LAST CHANNEL RECALL

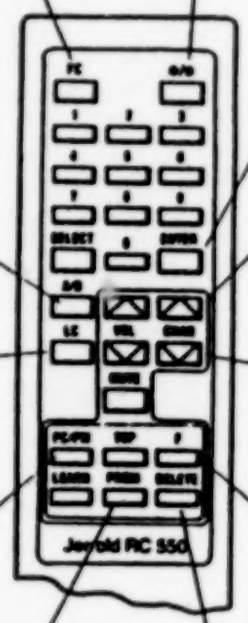
Press once to recall last channel tuned. Press again to return to current channel.

PARENTAL CONTROL

Used to select channels for Parental Control

Used to add a Favorite Channel

Used to remove a Favorite Channel

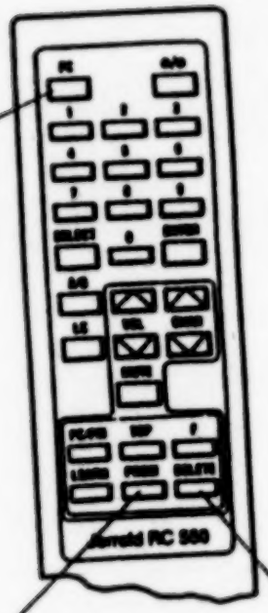


NOTE: The SELECT, VOL, MUTE, TCP, and LEARN buttons have no effect on your converter model DQN7-*.

FAVORITE CHANNEL OPERATION

TO SCAN FAVORITE CHANNELS

Press FC to step to next higher favorite channel.



TO ADD A FAVORITE CHANNEL

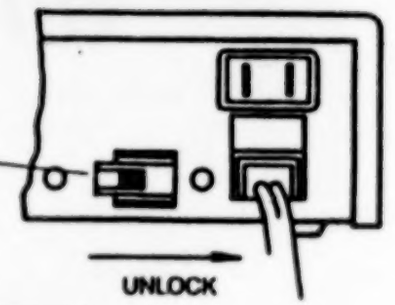
1. Tune to the channel desired.
2. Press PRGM.
3. The channel is now a favorite channel.

TO REMOVE A FAVORITE CHANNEL

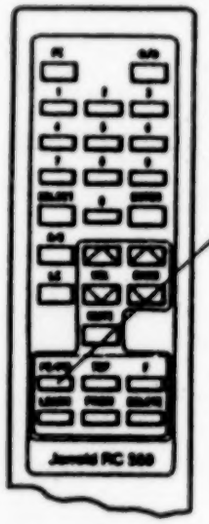
1. Tune to the channel desired
2. Press DELETE
3. The channel is no longer a favorite channel.

PARENTAL CONTROL– CHANNEL SELECTION

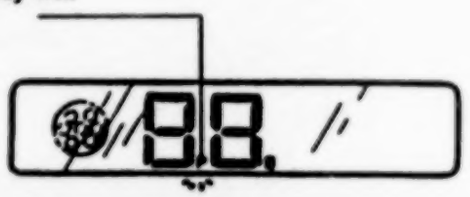
1. Remove the padlock (if already attached) from the bracket on the rear panel of the converter, and place the switch in the unlocked position.



2. Tune the channel which is to be parentally controlled.



3. Press PC/PM to select channel for parental control.
4. P indicator on converter display will light.



5. Repeat steps 2, 3, and 4 for all desired parentally controlled channels.

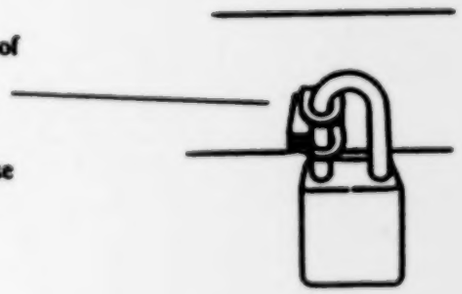
NOTE This portion of the procedure simply identifies the channels to be parentally controlled; it does not lock them out. See next page for activation of parental control feature.

PARENTAL CONTROL– ACTIVATION

NOTE: The user provides a padlock with a shackle diameter 1/16-inch or smaller.

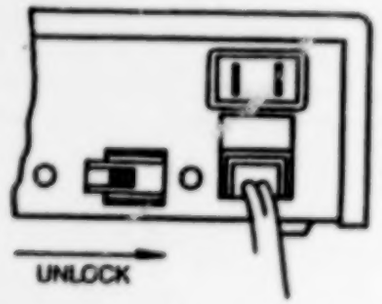
1 After selecting the channels to be controlled (see previous page), push the switch on the rear panel to the locked position.

2 Pass the shackle of the padlock through the two holes in the bracket, and close the padlock.

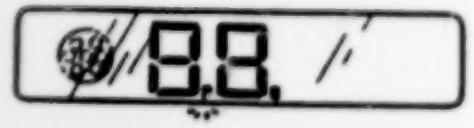


PARENTAL CONTROL– DELETION

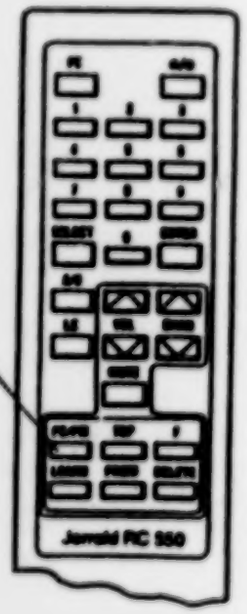
1 Remove the padlock and push the switch on the rear panel to the unlocked position.



2 Tune the channel which is to be uncontrolled. The P indicator will be on.



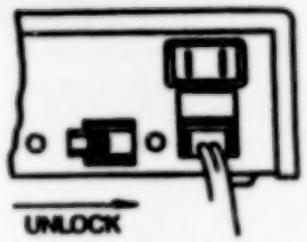
3 Press PC/PM to deselect the channel for parental control.

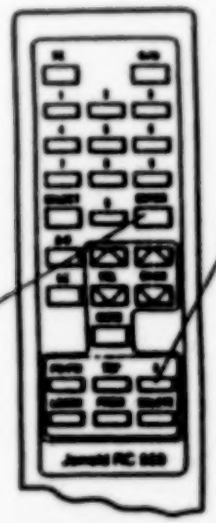


4 The P indicator will go out. The P indicator will be on only for those channels which are selected for parental control.

PARENTAL CONTROL– SET OVERRIDE CODE

1 Remove the padlock and push the switch on the rear panel to the unlocked position.





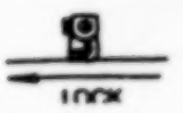
2 Press the F button. The channel indication "——" will display.

3 Press the numbered buttons to select your secret parental control override code. Up to four digits may be used for this code. If more than four digits are pressed, only the last four digits will be used for this code.

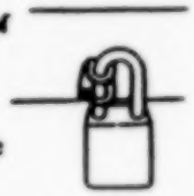
4 Press ENTER to store your secret code in the converter.

If you are slow in entering your code (more than five seconds between numbers), or if you press a button which is not a number, the converter will return to normal operation. IF YOU PRESS "ENTER" AFTER PRESSING "F", WITHOUT SELECTING A SECRET CODE, NO CODE WILL BE ENTERED. TO ENTER A CODE, BEGIN THIS PROCEDURE AGAIN.

5 Push the switch on the rear panel to the locked position.



6 Pass the shackle of the padlock through the two holes in the bracket, and close the padlock.

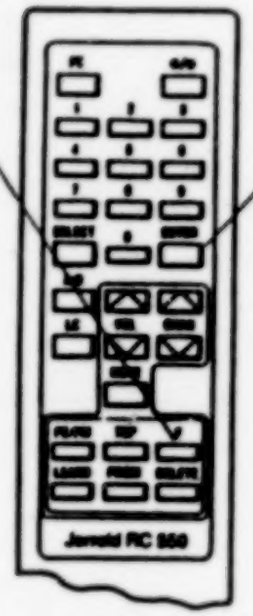


PARENTAL CONTROL– OVERRIDE

The parental control override feature allows you to view those channels designated for parental control without removing the padlock. To override the parental control lockout, follow these instructions:

1 Press the F button. The channel indicator will display "——".

2 Press the numbered buttons to enter your secret code. Up to four digits may be used for your secret code. If more than four digits are pressed, only the last four will be used for the code.



3 Press ENTER. If the correct code was entered, the parental control will be overridden and all parentally-controlled channels may be viewed.

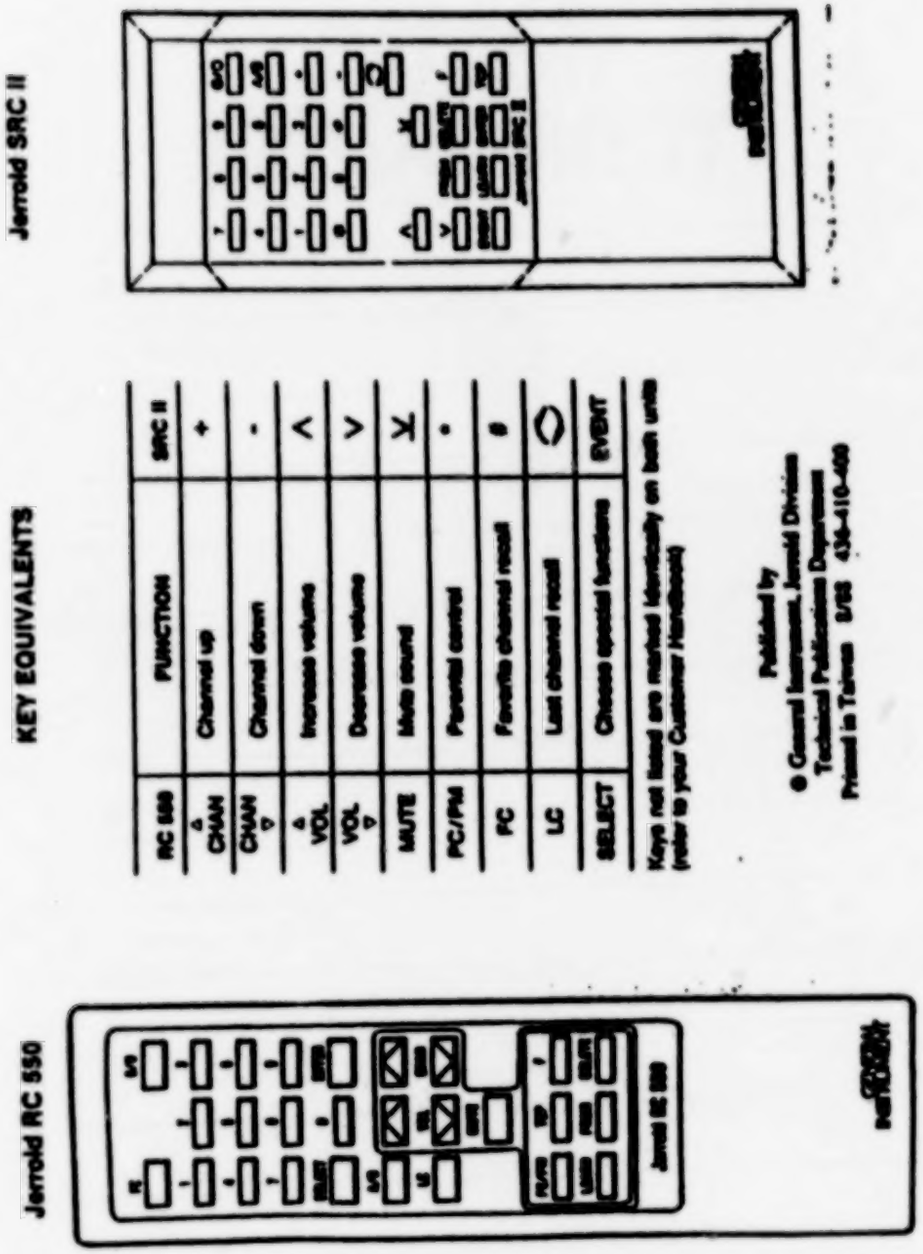
4 To electronically relock the parental control, press the F button twice. If the converter is turned off, the parental control will automatically lock.

NOTE: You have three tries to enter the correct secret code. If the wrong code is entered three times in a row, the converter will not accept override codes for fifteen minutes. On the fourth attempt when you press the F button, the converter will display "E5" for 2 seconds. However, if you chose not to wait fifteen minutes, you can remove the padlock to unlock the parental control.

REMOTE CONTROL— BATTERY REPLACEMENT

The battery used is a 9-volt, rectangular battery, NEDA type 1604 or equivalent.

1. Squeeze and lift tab to remove back cover.
2. Remove old battery.
3. Snap new battery onto connector.
4. Place battery in compartment and replace cover.



FCC Caption Omitted

COMMENTS OF
Ann Arbor Community Access Television

Ann Arbor Community Access Television (AACAT) submits these comments in response to the above captioned proceeding and in support of the comments filed in this proceeding by the Alliance for Community Media, Alliance for Communications Democracy, American Civil Liberties Union and the People for the American Way.

In particular, AACAT agrees that the provisions of Sections 10(c) and 10(d) and the proposed rules all will be unconstitutional. Assuming that the Commission decides to adopt rules to implement either Section 10 (c) or 10(d):

a. The rules should be specific and as narrowly drawn as possible, and must contain limitations that prevent cable operators from hampering use of access channels by those who wish to produce live or cablecast taped programming under the guise of applying the rules. For example, would FCC rules prohibit a program such as "Sexy Minutes", which is produced by a University of Michigan professor with the intent of providing critical answers to questions of human sexuality in a "live call-in" format? This would undoubtably be a detriment to the community!

b. Access centers have very limited resources. The FCC rules should make it clear that any actions taken by an operator under Section 10 must be undertaken at the operator's own expense.

c. Approximately 240 hours of video and 240 hours text programming are cablecast each week on the (3) access channels in my community. Much of the programming is produced by volunteers, and experience shows that it must be as easy as possible for these volunteers to use. The rules must recognize that any roadblocks that are placed in the way for production will result in a reduction in speech.

We believe that the rules must be developed in a manner that the first amendment rights of our volunteer community producers are not abridged. The issue of prior restraint and the appropriate legal remedies should also be addressed in this proceeding.

Respectfully submitted,

/s/

Harry S. Haasch
Cable Administrator
City of Ann Arbor, Michigan

DATE: December 7, 1992

Cover Redacted

JOINT COMMENTS

BLADE COMMUNICATIONS, INC.
MULTIVISION CABLE TV CORP.
PARCABLE, INC.
PROVIDENCE JOURNAL COMPANY
SAMMONS COMMUNICATIONS, INC.

Table of Contents Omitted

Summary

The Commission's Notice of Proposed Rule Making seeks comment on proposed regulations implemented pursuant to the provisions of The Cable Television Consumer Protection and Competition Act of 1992 that restrict access by children to indecent programming on leased access channels and enable cable operators to prohibit the use of "PEG" access channels for obscene programming. While the Companies commenting herein firmly believe that these statutory provisions do not pass constitutional muster, the Commission must nonetheless ensure that the proposed regulations are workable and fair. Accordingly, the Commission should adopt the following recommendations:

- define the relevant "community" for determining standards of indecency as consisting only of cable subscribers, or, in some cases, subscribers to a particular channel or tier.
- allow operators who "sequester" indecent programming on a single leased access channel to count that channel toward the allotment of channels that must be dedicated to leased access and require the programmer to bear

any cost of blocking the channel.

- require programmers to notify operators whether or not programming contains indecent material in advance of channel use and in a specified written format.
- define how an operator's written indecency policy is published, and permit operators to require appropriate indemnification and insurance from programmers.
- establish as grounds for an operator's "reasonable belief" that programming contains indecent material either a programmer's certification to that effect or a programmer's refusal to so certify.
- limit liability for operators who comply with the prescribed regulatory steps for obtaining programmer certification.
- require programmers seeking to air programs on "PEG" access channels to certify whether or not the program contains obscene material and limit operator liability.
- state that operators need not air a leased access program found indecent or obscene by a governmental body.

FCC Caption Omitted

JOINT COMMENTS

Blade Communications, Inc., MultiVision Cable TV Corp., ParCable, Inc., Providence Journal Company,[1] and Sammons Communications, Inc. (hereinafter "Companies"), by their attorneys, hereby submit their Joint Comments in response to the above-captioned Notice of Proposed Rulemaking ("Notice"). Each

---

[1] Providence Journal Company conducts its cable television operations through its subsidiaries Colony Communications, Inc. and King Videocable Company.

of the Joint Parties is an owner and operator of cable television systems and, accordingly, will be directly affected by the outcome of this proceeding.

A. Introduction

The Cable Communications Policy Act of 1984 required cable operators to set aside certain channels for use by nonaffiliated programmers through noncommercial "PEG" access or commercial leased access.[2] These provisions, always of questionable status under the First Amendment[3], force cable system operators to carry programming against their own editorial judgment and without regard to the wishes or interests of cable subscribers.

The Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385 (the "1992 Act"), grafts new requirements on the 1984 access provisions for the purpose of restricting the distribution of "indecent", "obscene" and other material over the access channels. The new provisions run even further afoul of the First Amendment, trampling not only on the rights of the operator, as before, but also now on the rights of the access programmer.

Despite the fundamental constitutional infirmities of the access provisions, the cable industry heretofore has accepted the obligation of providing access as part of its public interest responsibilities. These new requirements will make the burden of complying so difficult and the risk of liability so serious that the industry can no longer acquiesce in what has always been a highly questionable scheme. That the new statutory provisions raise significant new risks and burdens is evidenced by the fact that they were almost

---

[2] 47 U.S.C. §§ 531 and 532 (1988).

[3] The status of cable systems as first amendment speakers akin to newspapers is well recognized by the courts *See Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); and *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) Thus, the fundamental concept of mandatory access is constitutionally suspect. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) *and see also Century Federal, Inc. v. City of Palo Alto*, 710 F.Supp 1552, 1554 (N.D. Cal. 1987).

immediately challenged in the courts.[4]

Meanwhile, the Commission faces the perplexing task of adopting regulations to implement these difficult and legally precarious provisions. Until the statutory provisions that require these rules are declared unconstitutional — which the Companies are confident they will be — the Commission has no choice but to attempt to make something operable of a flawed and unfortunate situation.

* * *

The Commission already recognizes that cable subscribers need far less protection from obscene or indecent programming than do members of the general public.[8] Unlike programs broadcast on "free" TV or radio, which permeate the airwaves and often come into the home unexpectedly, cable programming must be affirmatively invited into the home through the viewer's act of subscribing to cable service. In addition, the subscriber has the option of buying only basic cable programming and foregoing other tiers, channels or even individual programs that might contain programming he or she considers objectionable. Furthermore, there already is federal legislation that requires cable operators to furnish cable subscribers with "parental control devices" or "lock boxes" to block off or restrict viewing of certain channels in their own homes. *See* 47 U.S.C. § 544(d)(2)(A); 47 C.F.R. § 76.11; 50 Fed. Reg. 18,655 (1985). Finally, a cable subscriber who finds cable programming in general "patently offensive" can cancel the subscription and still receive television programming off-air or through other delivery systems.

* * *

---

[4] *See Time Warner Entertainment Company, L.P. v. FCC and United States*, Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992); *Discovery Channel v. United States*, Civil Action No. 92-2558 (D.D.C. filed Nov. 13, 1992).

[8] *See Report of the Commission* in MM Docket No. 89-494, 67 RR2d 1714, 1726 (1990) and *Notice of Inquiry* in MM Docket No. 89-494, 4 FCC Rcd 8358, 8364 (1989).

Respectfully submitted,

BLADE COMMUNICATIONS, INC.
MULTIVISION CABLE TV CORP.
PARCABLE, INC.
PROVIDENCE JOURNAL COMPANY
SAMMONS COMMUNICATIONS, INC.

By: /s/
Donna C. Gregg

/s/
Michael K. Baker

Their Attorneys

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006

December 7, 1992

FCC Caption Omitted

COMMENTS OF THE BOSTON COMMUNITY ACCESS AND PROGRAMMING FOUNDATION

The Boston Community Access and Programming Foundation is a 501(c)(3) nonprofit corporation established in 1982 to provide public access and community programming to Boston residents. We operate two channels, known as the Boston Neighborhood Network (BNN), on the Boston cable system. Our primary funding comes from Cablevision of Boston.

BNN's access operation provides training and production facilities to Boston residents and institutions wishing to produce programs. We also present staff-produced programming, most notably a daily half-hour neighborhood news program. During our last fiscal year, BNN cablecast 1,326 original access programs, plus 713 original Foundation-produced programs. Including repeats, we cablecast 2,797 *programs*, or 2,319 *hours* of programming.

We work hard to involve ethnic, racial, and linguistic minorities in program production in order to serve the many diverse audiences that comprise our city. Our goal is to make the channel as rich in diversity as the city itself.

We wish to specifically comment on the Commission's proposed regulation, paragraph (d), which would enable a cable operator to prohibit certain types of programming on public, educational and governmental access channels.

A Solution in Search of a Problem

Before promulgating a rule as far-reaching as the one the Commission proposes, the Commission should first establish that there is a problem that needs to be solved. In fact, neither the FCC nor Congress has shown that any problem exists. The Commission, in its *Notice of Proposed Rulemaking*, gives no information at all about whether or not *any* programming actually exists on access

channels that it feels is inappropriate. Congress, in its debate, provided a *single* example: Senator Fowler asserted that access channels are used to solicit prostitution through shams such as escort services and fantasy parties, and Senator Wirth stated that he had seen this material in New York City. *Cong. Rec.*, Jan. 30, 1992, S649-50 (daily ed.). (Even this one example is questionable, since commercial programming is normally carried on *leased* access channels, not public access.)

There are 250 access systems in Massachusetts alone, and literally thousands across the country. To subject *all* of these systems to a complex and burdensome system of regulations because of alleged problems at a single system is a classic case of bureaucratic overkill. What makes this situation more absurd is that, if the alleged programming really does exist in New York City, it could probably be stopped through existing laws dealing with prostitution.

For more than nine years, the Boston Community Access and Programming Foundation has operated one of the nation's largest and most ethnically diverse public access operations. Over this time, we are not aware of any programs that would fall into the categories of prohibited material under the proposed FCC rule, as we understand the rule.

To be sure, we have had programs that were controversial, including some that have offended viewers. We have responded to the issue of "offensive" programming in a way that we feel addresses the legitimate needs of three separate groups: (1) parents who do not want their children exposed to particular programs, (2) adult viewers who would like the opportunity to view a diversity of programs, and (3) producers who are exercising their First Amendment right of free speech.

The process we have devised is as follows: First, we require producers to inform the Foundation, when requesting cablecast time, if a program may be offensive to some audiences or is of a mature nature. The Foundation may require producers to place an appropriate viewer warning at the beginning of these programs. Depending on the nature of the program, the Foundation may also require that the program be cablecast after 10 p.m. or after 11 p.m.

A producer who disagrees with staff decisions on these matters may appeal to a Grievance Committee consisting of three Trustees and two producers.

In fact, there have been *few* disputes, since staff and producers are usually in agreement about the most appropriate time for a program. On two occasions over the past year, the Grievance Committee was asked to decide whether programs were too "offensive" for 10 p.m. time slots. One was a program by an African-American producer of "uncensored" rap music, containing repeated use of an offensive word. The other program was a gay drama, suggesting phone fantasies as the ultimate form of "safe sex." As our most risqué programs, these are the types that would be in jeopardy under the Commission's proposed rule. It is interesting that the programs that would be endangered are programs by and for minority communities—African-Americans and gays.

In Boston, through a community process, we have already accomplished the legitimate intent of the Commission's rulemaking: to minimize the risk that children will be exposed to inappropriate programming. Before subjecting Boston and other access centers to burdensome government regulation, the Commission has an obligation to see whether its goals can and are being accomplished through less intrusive means.

Proposed Rule is Overbroad

The proposed regulation would simply reiterate the language from the Cable Consumer Protection and Competition Act to prohibit "any programming that contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Obscenity has been defined by the courts over the years. The public therefore has at least some idea what it means. But the term "sexually explicit" appears to be a new term, never before defined.

In note 11 of its *Notice*, the Commission hints that "sexually explicit" might mean the types of "indecent" programming that the Act says may be prohibited by cable operators over leased access channels, specifically programming that "describes or depicts sexual

or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium."

This interpretation is flawed. The courts have repeatedly ruled that the First Amendment does *not* permit a 24-hour-per-day ban on material that is indecent but not obscene. *The Commission has an obligation to interpret the law in accordance with the Constitution.* The Commission must interpret the law to say that "sexually explicit" programming means exactly the same as "obscenity."

Courts have faced the issue of indecent communications in various cases dealing with cable television, broadcast radio and television, and telephones. In *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985), the Court of Appeals overturned a City of Miami ordinance prohibiting indecent material on the city's cable system. In *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S.Ct. 1281 (1992), the Court of Appeals struck down the FCC's 24-hour-per-day ban on indecent broadcasts over radio and television. In *Sable Communications v FCC*, 492 U.S. 115 (1989), the U.S. Supreme Court ruled that the FCC could not place a total ban on indecent commercial messages (known as "dial-a-porn") over interstate telephone lines. The definition of "indecency" in all three cases was similar to the definition that the Commission apparently believes applies to cable access.

The Supreme Court in *Sable* summed up the constitutional requirement:

> Sexual expression which is indecent but not obscene is protected by the First Amendment. . . The Government may, however, regulate the content of constitutionally protected speech in order to promote a *compelling interest* if it chooses the *least restrictive means* to further the articulated interest.

Sable at 126 (emphasis added). The Court agreed that there *was* a compelling interest in protecting the physical and psychological well-being of minors. However, a 24-hour-a-day ban on indecent material was not a permissible way to achieve that end, since such

a blanket prohibition would deprive *adults* of their ability to receive Constitutionally protected speech. The Court cited ***Butler v. Michigan***, 352 U.S. 380 (1957), where a law was found to be too restrictive when it "denied adults their free speech rights by allowing them to read only what was acceptable for children. As Justice Frankfurter said in that case, 'Surely this is to burn the house to roast the pig.'" *Sable* at 126, citing *Butler* at 383.

The proposed FCC rule, as its applies to cable access, does not pass either of the two *Sable* tests. First, it does not "promote a compelling interest," since there is no evidence to indicate that any material even *exists* on cable access from which minors need protection. Second, it does not use the "least restrictive means to further the articulated interest." As the Court already ruled in *Sable*, a 24-hour ban does *not* meet this test.

The Commission is indeed proposing to "burn the house to roast the pig"—yet in this case the pig does not even exist.

Less Restrictive Means Are Available

If the Commission determines that there exists an abundance of indecent programs on access television from which children need protection, then there are ways to accomplish this objective that are less intrusive than the Commission's proposal.

Most simply, the problem could be addressed at the local level. The procedure described above for Boston is one such approach. Other access operations may have their own procedures that work equally well.

Additionally, parents who do not want their children exposed to programming on an access channel could use the parental "local-box," which is required to be provided by all cable operators under the Cable Communications Policy Act of 1984 §624(d)(2)(A), 47 USC §544(d)(2)(A). A lock-box is defined as "a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber."

Finally, a subscriber has the option of terminating cable service.

The FCC was given a limited power to regulate "indecency" on radio and television because the broadcast media had established a

"uniquely pervasive presence" and was "uniquely accessible to children," *FCC v. Pacifica Foundation*, 438 U.S. 726 at 748-49 (1978). The Court in *Cruz v. Ferre*, 755 F.2d at 1420, stated that *Pacifica* did *not* apply to cable television, because cable subscribers have many options—including lock boxes and disconnecting service—to control program viewing by children.

Rule's Vagueness Will Lead to Uneven Enforcement

The wording of the proposed rule does not give cable operators, access channel operators, or access producers a clear sense of what programming is allowed and what is not. While the courts have stated that the FCC definition of "indecency" is not vague when applied to broadcasting, they did so in the context of a single enforcement agency—the FCC—which has over the years developed an elaborate series or policy statements and precedents. This is far different from the case of cable access prohibitions, where determination of whether a program is "sexually explicit" would be made by literally thousands of individual cable system managers. Many diverse standards will emerge for prohibited programming, based not only on different corporate philosophies, but on the beliefs and prejudices of each individual general manager.

It is almost certain that *some* over-zealous cable operators will misinterpret the Commission's concept of sexually explicit conduct. The burden will be on public access speakers, who will be required to seek court relief to obtain their First Amendment rights. Most public access producers simply have no funds to hire lawyers, and will lose their Constitutional rights for lack of funds.

What is most disturbing is that the types of programming that cable operators are today most eager to eliminate are precisely the types that the First Amendment was created to protect—programs by gays and others with unpopular lifestyles, rap artists and others with "offensive" manners of speech, and "hate" groups and other extremist political groups.

Regulations Would Impose Unfair Burden on Access Producers and Organizations

The "Initial Regulatory Flexibility Analysis" attached to the Commission's *Notice* notes that the regulations would impose new burdens on cable operators—but fails to mention the far greater burdens that would be imposed on nonprofit access organizations, institutional access producers, and individual access producers.

The Commission suggests only one idea for a process to actually carry out its proposed rule. In paragraph 14 of its *Notice*, the Commission proposes that producers and access organizations would need to "certify" that every program that was cablecast did *not* contain material prohibited under the Commission rules. Although not stated by the Commission, the certification would apparently be submitted to the cable operator, who would apparently have the right to intercept and black-out any programs that were not so certified. In order to make this certification, independent nonprofit organizations that operate access channels would need to pre-screen all tapes prior to cablecast. In Boston, we would need to allocate staff time to view and evaluate each of the 1,326 individual access programs we cablecast per year, and would need to file a certification with the cable operator for each of them. This imposes a huge new burden of staff work and paperwork on organizations such as ours, which, by their very nature, are already grossly understaffed and overworked.

Furthermore, if the necessary paperwork were not filed for a particular program in a timely fashion, the cable operator might decide to delete that program from cablecast. There are very few, if any, access programs that actually contain material prohibited by the proposed rule. For every program that the cable operator takes off the air for reasons of program content, a far greater number will be taken off for failure to file necessary paperwork.

What will happen to live programming, such as call-in programs, political debates, or coverage of city council meetings? Since the cable operator can never be certain what live programming will contain, will all live programming be banned? Such a blanket prohibition seems a case of prior restraint.

It would be ironic if one of the final actions of the Reagan-Bush FCC—a Commission dedicated to removing unnecessary government regulations—would be to impose a burdensome, vague, and overbroad regulation that addresses a problem that does not exist.

Recommendations

The Commission should rewrite its proposed rule to eliminate the category of "sexually explicit" programming, since that category *must* be interpreted to mean "obscene" programming.

Individual access producers should have the responsibility of determining whether their programming is obscene or promotes illegal activity, but should *not* be required to complete unnecessary paperwork in cases where programs are acceptable.

Respectfully submitted,

/s/

Martin Kessel, Clerk
Boston Community Access
and Programming Foundation
8 Park Plaza, Suite 2240
Boston, Massachusetts 02116

December 4, 1992

FCC Caption Omitted

COMMENTS OF
Roxie Lee Cole, Citizen

Roxie Lee Cole submits these comments in response to the above captioned proceeding and in support of the comments filed in this proceeding by the Alliance for Community Media, Alliance for Communications Democracy, American Civil Liberties Union and the People for the American Way.

In particular, Roxie Lee Cole agrees that the provisions of Sections 10(c) and 10(d) will be unconstitutional, however they are implemented. However, assuming that the Commission decides to adopt rules to implement either Section 10(c) or 10(d):

a) The rules should be specific and as narrowly drawn as possible, and must contain limitations that prevent cable operators from hampering use of access channels by those who wish to produce live or cablecast taped programming under the guise of applying the rules. The public access operation I was involved with for over thirteen (13) years did live programing of community events that ranged from professional entertainers to the very inexperienced performer. We have live discussions that ranged from very serious health problems to neighborhood street widenings — all with no problem nor need for censorship.

b) The 1984 Cable Act limited much of the support access centers had been receiving from cable companies previously. The access center resources are very limited and the FCC rules should make it clear that any actions taken by an operator under Section 10 must be undertaken at the operator's own expense. The 1992 Cable Act was intended to cut cost to the consumer; however, these new rules will in fact increase the consumer bill.

c) More than 100 hours are video and text programming are cablecast each week on the access channel in my community. The majority of the programming is produced by volunteers, and

experience shows that it must be as easy as possible for these volunteers to use. Many neighborhood meetings are done with a single camera and taped and run gavel to gavel. Any rules must recognize that any roadbloacks that are placed in the way for production will result in a reduction in speech.

During my 13 years of experience, many times the cable operator and/or City representatives would have limited speech of some citizens if they could have legally. I am greatly concerned for the many citizens who now freely speak will lose this right because of the proposed rule changes.

Respectfully submitted

/s/
Roxie Lee Cole
1145 Bishop Drive, Apt F
Dayton, Ohio - 45449

December 7, 1992

FCC Caption Omitted

COMMENTS OF
Columbus Community Cable Access, Inc. (ACTV 21)

Columbus Community Cable Access (ACTV 21) submits these comments in response to the above captioned proceeding and in support of the comments filed in this proceeding by the Alliance for Community Media, Alliance for Communications Democracy, American Civil Liberties Union and the People for the American Way.

In particular, ACTV 21 agrees that the provisions of Sections 10(c) and 10(d) will be unconstitutional, however they are implemented. However, assuming that the Commission decides to adopt rules to implement either Section 10(c) or 10(d):

a. The rules should be specific and as narrowly drawn as possible, and must contain limitations that prevent cable operators from hampering use of access channels by those who wish to produce live or cablecast taped programming under the guise of applying the rules.

b. Access centers have very limited resources. It could cost as much as $35,000.00 per year to implement the Commission's rules for the 5,824 hours of programming which is transmitted yearly on the public access channel alone. There are, also, an educational access channel and a government access channel in Columbus, each with an equivalent number of annual hours of programming. The FCC rules should make it clear that any actions taken by an operator under Section 10 must be undertaken at the operator's own expense.

c. Approximately 112 hours of video and text programming are cablecast each week on the public access channel in our community. Much of the programming is produced by volunteers, and experience shows that it must be as easy as possible for these volunteers to use the access channel. Any rules must recognize that

any roadblocks that are placed in the way of production will result in a reduction in speech.

ACTV 21 is a nonprofit organization which operates the public access channel serving more than 225,000 cable subscribers in Franklin County, Ohio. ACTV is funded, in part, through the 3% franchise fee from the City of Columbus.

The services provided by ACTV 21 include video training, equipment and facility usage, program scheduling and promotion, and a volunteer corps. The public access channel is operated as a public forum on a first-come, first-served basis. During the last eight years, ACTV 21 has trained 5,514 local citizens in video production. Those individuals, community organizations and nonprofit organizations have produced 14,892 original programs. The community volunteers have put in nearly 30,000 hours of volunteer work to assist other citizens in speaking on the public access channel.

More than 150 community organizations, nonprofits and churches used ACTV's services in 1991 alone. These organizations represent a variety of local interests such as: The John Birch Society, The Columbus Urban League, The Afro-American Center, Hispanic Alliance of Central Ohio, National Organization for Women, The Boy Scouts, United Way of Franklin County, Ohio Special Olympics, the Columbus Area Chamber of Commerce, BalletMet and the Native American Indian Center.

Any rules which the Commission may adopt must consider the affect of those rules on the current and potential speakers on public access channels who, often, represent unique and underrepresented points of view in our democracy.

Respectfully Submitted,

/s/
Carl Kucharski, Executive Director
Columbus Community Cable Access, Inc. (ACTV 21)
394 Oak Street
Columbus, Ohio 43215 DATE: December 7, 1992

Cover Omitted

FCC Caption Omitted

COMMENTS OF THE COMMUNITY ANTENNA TELEVISION ASSOCIATION, INC.

The Community Antenna Television Association, Inc, ("CATA"), is a trade association representing owners and operators of cable television systems serving approximately 80 percent of the nation's more than 60 million cable television subscribers. CATA files these "Comments" on behalf of its members who will be directly affected by the Commission's action.

INTRODUCTION

This proceeding is in response to the mandate of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"), that the Commission adopt rules and regulations implementing the provisions of that section. Essentially, Section 10 is intended to restrict the availability of programming deemed to be indecent or obscene on cable television access channels. First, it permits cable operators to voluntarily prohibit indecent programming on leased channels on their systems. Second, it requires the Commission to adopt rules that will limit access by children to indecent programming on leased channels by requiring operators to place all indecent programming on a single channel whose reception is blocked except upon a written request for it by the subscriber. Third, it permits operators to prohibit the use of public, educational, and government access channels ("PEG channels") for programming that contains "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Finally, Section 10 removes the operator's

statutory immunity from liability for obscene material on any access channel.

CATA submits that the provisions of Section 10 of the Cable Act are both unconstitutional and from a practical viewpoint, unworkable. Nevertheless, we understand that the Commission must attempt to carry out its mandate and we offer comments of a constructive nature designed to help the Commission make the best of a bad predicament.

I. THE INDECENCY AND OBSCENITY PROVISIONS ARE UNCONSTITUTIONAL AND UNWORKABLE

CATA would be more than remiss if it did not preface its "Comments" by firmly asserting that the provisions of Section 10 of the Cable Act are an unconstitutional infringement on the rights of cable operators, their subscribers and access programmers. We will not go through the legal rationale supporting our allegation in this proceeding because it already is well stated in the court challenge to the Cable Act filed by Time Warner (*Time Warner Entertainment Company v. FCC*) in U.S. District Court, where the issue will be decided. Suffice it to say that these provisions restrict the editorial control over the content and packaging of the cable operator's product and constitute a taking of the operator's property without just compensation in violation of the Constitution. The provisions of Section 10 put cable operators in the untenable position of requiring them to do what the government cannot do by acting as censors of programming. We will await the outcome of the Time Warner challenge to settle this issue.

From a more practical point of view, especially for smaller cable systems, which constitute a significant portion of CATA's membership, the indecency and obscenity provisions are unworkable. As proposed, the rules for both leased access and PEG access channels put the burden of determining whether a program violates the statute on the operator with respect to systems that choose to adopt a policy restricting the specified "indecent" or "illegal" programming respectfully. This virtually eliminates any live access programming as operators concerned about their liability will need to review each program before allowing it on the access channel.

Moreover, the provisions will require an inordinate commitment of manpower to review all access programming. It is the system operator who must review every program before it is carried on a leased access channel to determine whether it is "indecent," and every program before it is carried on a PEG access channel to determine whether it contains "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Smaller systems will be particularly hard hit because of their limited personnel. It is not unusual for these systems to have a small staff performing a variety of duties often in a number of communities, at one time. The end result we suggest, is a disincentive for operators to adopt policies restricting indecent programming on leased and PEG access channels.

Other practical problems exist with respect to the requirement that all indecent programming on leased access channels be put on a single, "blocked" channel. What happens if the channel becomes filled? How many additional channels must the operator make available? If none, which programmer's programs are to be carried? And what if the programs certified by the programmer as "indecent" really are not, but instead constitute an effort by an individual or group to prevent the carriage of any "indecent" programming by occupying all the time on the only channel available for that purpose?

The numerous constitutional and practical concerns serve to underscore the necessity of leaving control of access channels in the hands of the cable operator.

II. SUGGESTIONS FOR MAKING THE REGULATORY SCHEME MORE MANAGEABLE

CATA recognizes that the Commission is required to implement the provisions of Section 10 of the Cable Act despite their unconstitutional and unwieldy nature. Therefore, it offers the following constructive suggestions that should help make the regulatory scheme more manageable.

A. Operators should be given a "safety zone" within which they will not be held liable for the carriage of indecent or obscene programming.

CATA suggests that the model used for the single blocked channel, i.e., where the burden is on the programmer to notify the operator when a program is deemed to be indecent, be extended to cover other leased and PEG channels in situations where the operator has adopted a restrictive policy as contemplated by the statute. If an operator chooses to adopt a restrictive policy, he should be allowed to require and rely upon certifications from programmers that their programs do not violate the policy. If the operator adopts and follows an established procedure of requiring certifications from programmers, he will fall within a "safety zone" protecting him from liability for carriage of indecent programs on the leased channels or the prohibited programming on the PEG channels. The certifications would demonstrate compliance by the operator with the restrictive policy.

Using this approach, the Commission will protect the operator from the unintended situation where he is more vulnerable to liability for having adopted a policy against carriage of indecent or "illegal" programming than he if had not adopted one. The liability should be the same in both situations, If an operator adopts a policy to prohibit all indecent programming on leased channels for instance, as is permitted under the proposed regulations, he assumes liability for any indecent programming that is carried. On the other hand, operators who choose not to adopt a restrictive policy for leased access channels and instead provide only the single blocked channel, escape liability because they are permitted to rely solely on the word of the programmer with regard to whether a program is indecent. The Cable Act places the burden on the programmer who must tell the operator which programs are indecent.

CATA suggests that the same model be used in determining liability for carriage of obscene programming as well. If the operator can demonstrate an established procedure of requiring certifications that programming is not obscene, he should be entitled to the protection of the "safe zone" and not be held liable. At the very least, it should entitle the operator to a presumption that he did

not have the requisite element of intent to be liable for carriage of obscene programming.

B. "Indecency" should be defined in the context of cable television.

Access to programming on cable television is unique and distinguishable from other media. Cable only delivers programming selected by the subscriber and only upon request and payment of a monthly fee. Even after delivery the subscriber continues to maintain a high degree of control over the availability of the programming. Lockboxes may be secured (and in fact, must be provided by the operator upon request) that enable subscribers to control program viewing. And the newly created leased access channel of "indecent" programming will be "blocked" and available only upon written request from the subscriber.

Cable programming is not omnipresent like a television or radio signal. It is not likely to be stumbled upon by unwary viewers. It must be invited into the subscriber's home and specific programs as well as whole channels of programs, can be specifically uninvited. Thus, the term "indecent" should be defined narrowly when used in the context of programming on cable television systems.

C. Costs incurred in complying with these provisions must be accounted for in determining the system's basic service rates.

Section 3 of the Cable Act sets out requirements that will be used for determining reasonable and therefore, lawful rates to be charged for basic cable service. That section specifically provides that the rates must account,for among other things, the system's costs and PEG obligations. The Commission should make clear both in this proceeding and in its forthcoming one adopting rate regulation requirements, that costs incurred by system operators in complying with the indecency and obscenity provisions of Section 10 are to be accounted for in setting the basic service rate.

As we noted above, the new requirements will impose burdensome administrative obligations on many systems necessitating employment of additional personnel as they may be required to pre-screen all access programming before allowing it to

be carried. Systems that choose to carry indecent leased access programming will have the expense of purchasing and installing "blocking" equipment as well as the administrative cost of tracking subscriber requests for the channel. The Commission should make clear that these costs are to be accounted for in determining reasonable basic service rates.

D. Cable operators need at least 60 days notice that programming will be "indecent."

The provisions of Section 10 require suppliers of leased access programming to notify the cable operator when a program is indecent and therefore required to be carried on the designated single blocked channel. A period of at least 60 days is essential.

Ample lead time is needed to collect, prepare and disseminate information about the time and channel location of programming to be carried on the system. Usually this is done through the preparation and distribution of printed program guides, bill stuffers and other publications such as newspapers and their supplements where a 60 day turnaround time is commonly needed. In addition, both administrative and technical processes are required for shifting and inserting programming among channels on the system. These are not always simple, "throw the switch" processes especially for smaller less technically sophisticated systems where they will have to be performed "by hand" among other duties by existing personnel.

CONCLUSION

The Community Antenna Television Association, Inc., believes that the indecency and obscenity provisions of Section 10 of the Cable Act not only are unconstitutional, but also unworkable. To the degree they are implemented, following legal challenge, they must be designed to be sensitive to the various difficulties, costs and jeopardy they impose on system operators, and particularly smaller

operators. We offer the above proposals as constructive suggestions for making the best of a bad situation.

Respectfully submitted,

THE COMMUNITY ANTENNA TELEVISION ASSOCIATION, INC.

by: /s/
Stephen R. Effros
President

by: /s/
James H. Ewalt
Executive Vice President

Community Antenna Television
Association, Inc.
3950 Chain Bridge Road
P.O. Box 1005
Fairfax, VA 22030-1005
703/691-8875

December 7, 1992

Cover Redacted

COMMENTS OF CONTINENTAL CABLEVISION, INC.

Table of Contents Omitted

SUMMARY

Continental Cablevision, Inc. ("Continental") submits these comments to assist the Commission in its effort to implement Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("Act"). We raise three primary points.

First, in adopting rules to permit cable operators to prohibit obscene and indecent programming on public, educational, or governmental ("PEG") and leased access channels, the Commission must balance the cable operator's potential liability for obscene programs against the desire to minimize editorial intrusion into PEG and leased access channels. To this end, the Commission should permit cable operators to rely on certifications by programmers and should further provide that such reliance constitutes an affirmative defense to liability. If the Commission does not provide such a defense, cable operators must be permitted to make their own determination regarding the possible obscene nature of programs carried on leased and PEG channels.

Second, the Commission should clarify that all state and local franchise authority regulations, as well as specific franchise agreement provisions, that are inconsistent with the Act and the implementing regulations are preempted.

Third, when structuring the single channel requirement for leased access channels, the Commission must adopt regulations that will preserve the local cable operator's choice to prohibit or restrict indecent programming. If the regulations are unreasonable, unduly

cumbersome or costly, the result will be a *de facto* ban on such programming in contravention of congressional intent and constitutional requirements. In particular, the Commission should adopt rules that (1) permit cable operators to fully recover the costs of complying with the single channel requirement, (2) define single channel in a manner that maximizes efficient use of channel capacity, by requiring indecent programs to be aggregated together and scrambled on a single channel but permitting the remainder of the channel to be used for non-indecent and non-scrambled leased access programs, (3) delay implementation of the single channel requirement for 120 days so that cable operators have sufficient lead time to comply with the regulations, (4) require a 45-day notification requirement by leased access program providers of indecent programs to allow operator compliance with the single channel requirement, and (5) require a 30-day advance written notice of a subscriber's desire to change access to indecent programming.

FCC Caption Omitted

COMMENTS OF CONTINENTAL CABLEVISION, INC.

Pursuant to the Commission's Notice of Proposed Rulemaking ("NPRM"), Continental Cablevision, Inc. ("Continental") submits these comments on the proposed regulations implementing the provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Act") relating to indecent and obscene programming.

INTRODUCTION

Continental, founded in 1963, is the third largest multiple cable system operator and the largest privately owned cable company in the United States. It serves nearly 2.9 million basic subscribers in 600 communities in 16 states, or roughly 5.5% of the nation's cable television households. Public, educational, or governmental access ("PEG") channels are utilized in many of the communities

Continental serves. Leased access channels are also available for commercial use.

Continental operates in a decentralized manner, permitting its operating regions considerable discretion and autonomy in operating their systems and determining how best to serve their customers. To that end, Continental believes its cable systems should, consistent with the letter and spirit of the Act, retain the option of adopting policies prohibiting indecent programs on leased access or PEG channels or restricting the dissemination of such programs consistent with the statutory and regulatory restrictions. In order to preserve this choice for its systems, Continental submits these comments to assist the Commission in its effort to implement Section 10 of the Act in a manner that will avoid unnecessary logistical and practical problems for operators and subscribers. Adoption of rules that recognize these problems could help prevent transforming this provision into a *de facto* ban on indecent programs.

Before discussing these practical problems, we address two threshold issues in these comments. First, because of cable operators' potential liability for obscene programming on PEG and leased access channels, already in effect as of December 4, 1992, we urge the Commission to adopt a regulatory scheme that minimizes cable operators' editorial intrusion in access programming so long as their liability is correspondingly minimized. Second, we ask the Commission to clarify that all inconsistent franchise agreement provisions and local regulations are preempted.

I. THE COMMISSION SHOULD ADOPT RULES PERMITTING CABLE OPERATORS TO PROHIBIT CERTAIN TYPES OF PROGRAMMING IN A MANNER THAT MINIMIZES THE OPERATOR'S EDITORIAL INTRUSION AND, CORREPONDINGLY, ITS RISK OF LIABILITY

The Act directs the Commission to adopt regulations within 180 days of passage of the Act enabling cable operators to prohibit the use of any PEG channel for programming that contains "obscene material, sexually explicit conduct, or material soliciting or

promoting unlawful conduct."[1] Within 60 days of passage of the Act (*i.e.*, as of December 4), cable operators are subject to liability for carriage of obscene materials on the PEG channels.[2] In the NPRM, the Commission seeks comment on how cable operators can categories of programming on PEG channels and on additional issues the Commission should consider.[3]

There are a number of issues the Commission should consider. First, the Commission should clarify that the Act permits operators to prohibit some, but not all, of the types of programs listed in Section 10(c) of the Act. Nothing in the language of the Act, for example, prevents an operator from excluding only a subset of the broad categories included in Section 10(c) from its PEG channels.

Second, Continental views as essential the Commission's suggestion that cable operators should be permitted to require certifications from PEG programmers that no materials falling into any of the statutory objectionable categories will be presented on

---

[1] The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(c), 106 Stat. 1460, 1486 (1992) (to be codified as amended at 47 U.S.C. § 532) (hereinafter "Act").

[2] As the Commission noted in its NPRM, the amendment to Section 638 of the Act, which eliminates cable operators' immunity for leased access and PEG channels, is self-implementing and therefore effective December 4, 1992. NPRM at ¶ 2. Until such time as the Commission adopts rules permitting cable operators to prohibit obscene programs from their PEG channels, therefore, cable operators are subject to liability for obscene programming on PEG channels without any corresponding authority to exclude such programming from the PEG channels. This raises substantial constitutional and operational concerns for operators. Notwithstanding the above, cable programmers may already be found criminally liable for transmitting obscene material under 47 U.S.C. § 558.

[3] Lest the Commission think that sexually explicit programming on PEG channels is never an issue, we note by way of example that public access programs on one Continental system have included a program in which an access user, frontally nude, urinated on a photograph of the President of the United States and another concerning safe sex that involved a graphic 45 minute demonstration of how to use a condom.

the PEG channels.[4] Certification would minimize both the operator's editorial intrusion and operational burden. But these certifications can be relied on by the operator only if the Commission also makes clear that a cable operator who relies on such a certification has an affirmative defense to liability if material is later found to fall within a prohibited category, notwithstanding the programmer's prior certification to the contrary.[5]

If the Commission does not provide for programmer certification and permit those certifications to be an affirmative defense to liability, the cable operator must be permitted to (1) make its own determination, notwithstanding any certification, that material is obscene and should be excluded, (2) word its certification request in whatever form it desires — *e.g.*, all sexually explicit material, and (3) be held harmless for decisions to exclude material the operator reasonably believes to be obscene. If the cable operator is going to be held liable — potentially criminally liable — for obscene programming on the PEG channels even if a programmer certifies there is no such programming, then the operator must be afforded the discretion to exclude material that the operator reasonably believes to be obscene. And the operator must be permitted to ask for certification regarding a broader category of programming than obscenity — "sexually explicit" material, for

---

[4] In the NPRM, the Commission states that certification by "users or operators" could be sought. NPRM at ¶ 14. Continental assumes the Commission intended to mean programmers and program providers.

[5] Such a procedure would be consistent with the Commission's decision involving obscene or indecent programming carried on multipoint distribution service (MDS) systems, in which the Commission concluded that "there must be a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions before any liability is likely to attach." *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, Memorandum Opinion, Declaratory Ruling and Order, Docket No. 83-989, 2 FCC Rcd. 2819, 2820 (1987).

example — so that the operator can review the sexually explicit programs to decide if it reasonably believes any of it is obscene.[6]

Finally, the Commission should extend its rules governing a cable operator's ability to prohibit these kinds of programs on leased access channels. Specifically, cable operators should be expressly permitted to exclude from leased access channels obscene programs only and, if they so choose, to rely on certifications (with a defense against liability) to enforce such a policy.

II. THE COMMISSION SHOULD CLARIFY THAT ALL STATUTES OR REGULATIONS OF ANY STATE, FRANCHISING AUTHORITY OR OTHER LOCAL GOVERNING BODY THAT ARE INCONSISTENT WITH THE ACT AND COMMISSION'S REGULATIONS ARE PREEMPTED

Many state and local franchise authority regulations, as well as specific franchise agreement provisions, will be directly affected by the substantial alterations in the Act and the FCC's rules on indecent and obscene cable television programming on leased access and PEG channels. Many existing franchise agreements, for example, prohibit cable companies from exercising editorial control over the content of programming on these channels.[7] Because those franchise provisions are inconsistent with the provisions in the Act authorizing cable operators to prohibit or restrict certain types of programming on PEG and leased access channels, the Commission should clarify in its order that all inconsistent provisions in franchise agreements and state or local regulations are preempted by the new federal statutory provisions and implementing

---

[6] Although, as the Commission notes, these disputes involving PEG channels are frequently resolved at the local level, NPRM at ¶ 14, it is the Commission that has been directed to establish the regulatory framework.

[7] The franchise agreement between Continental's Greater Dayton (Ohio) system and the Miami (Ohio) Valley cable Council provides, for example, that the cable operator "shall exercise no control over program content on any of the access channels."

regulations, pursuant to the Section 656 of the Communications Act, 47 U.S.C. § 556.

There is a related issue the Commission should clarify. Pursuant to the enabling regulations of the local franchising authority (or in franchise agreements), many cable operators have entered into arrangements with independent access corporations whereby the operators sign over editorial control for programming on cable channels.[8] Frequently, the access corporations transmit live programs directly from their studios onto dedicated PEG channels. Many access agreements contain a provision indemnifying the cable operator for liability stemming from the actions of the corporation. These indemnification provisions, however, would not appear to (nor could they) protect the operator from criminal liability for airing obscene material under the new liability provisions of the Act. Thus, the Commission should also provide that any contractual arrangements with independent access corporations, to the extent these provisions limit a cable operator's control over obscene or indecent programming, are also preempted by the Act.

III. THE COMMISSION MUST ADOPT REASONABLE REGULATIONS RESTRICTING INDECENT PROGRAMMING ON LEASED ACCESS CHANNELS OR THE RESULT WILL BE AN UNCONSTITUTIONAL *DE FACTO* BAN ON ALL INDECENT PROGRAMMING

The Act grants cable operators the choice of either: (1) prohibiting all indecent programming on leased access channels, or (2) restricting indecent (but not obscene) programming, pursuant to the regulations adopted by the commission, to a single leased channel and restricting access to the indecent programming unless

---

[8] The franchise agreement between Continental Cablevision of Brockton, Inc, and the Brockton, Massachusetts, nonprofit access corporation, for example, provides that the access corporation "shall have sole responsibility for determining access and scheduling of time on the allocated channels."

the subscriber requests access in writing.[9] Continental urges the Commission to adopt regulations that will in fact (not just in theory) preserve the local cable operator's choice to either prohibit or restrict such programming. If the Commission adopts regulations that are unreasonable, unduly cumbersome or costly, the result will be a *de facto* ban, which would be contrary to Congress' intent[10] and a clear violation of the Constitution.[11]

The Commission should, therefore, adopt rules that (1) permit cable operators to fully recover the costs of complying with the single channel requirement, (2) define single channel in a manner that maximizes efficient channel usage, (3) delay implementation of the single channel requirement for 120 days so that cable operators have sufficient lead time to equip themselves and their customers so that they can comply with the requirements, (4) provide a reasonable notification period by program producers to allow cable operators time to restrict access to indecent programs, and (5) require a 30-day advance, written notice of a subscriber's desire to change access to indecent programming.

---

[9] Act at § 10.

[10] *See* 138 Cong. Rec. S646,649 (daily ed. January 30, 1992). In discussing the provision of the Act permitting cable operators to prohibit indecent programming on leased access channels, the sponsor, Senator Jesse Helms, stated: "The pending amendment merely gives cable operators the legal right to make that decision. The amendment does not require cable operators to do anything. Therefore, let me say it again, this amendment does not in any way propose censorship." *Id.* at § 646.

[11] *See Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115 (1989) (statutory ban on indecent telephone messages violates the First Amendment); *Action for Children's Television v. Federal Communications Commission*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992) (ban on all radio and television broadcasts of indecent material violates the First Amendment).

A. The Commission Must Permit Cable Operators To Recover The Full Cost Of Complying With The Act

Restricting indecent programming on leased access channels to a single channel and scrambling such programming to prevent reception unless the subscriber has affirmatively requested access will impose significant costs on the cable operator. If operators are not permitted to recover these costs in full, they will be forced, as a practical matter, to adopt instead a policy prohibiting all such programming. The single channel requirement would thereby be converted into a *de facto* ban. Although the Commission does not seek comment on the magnitude — or recovery — of costs in this proceeding, these costs must be recoverable. We therefore describe these costs here, while recognizing that they may need to be considered in the ratemaking proceeding as well.[12]

The costs the cable operator will incur to comply with the single channel requirement are substantial. For example, if a system carries any indecent leased access programming, the operator will be required to purchase an additional scrambler at each head end and install positive traps for each subscriber wishing to receive the scrambled leased access channel containing indecent programming. Aside from the actual costs of the scramblers and traps, there are the additional costs of installation, maintenance, inventory, and service. Perhaps the greatest cost will result from the possible need to provide a separate channel dedicated solely to indecent leased access programming. This change would in many cases also have a domino effect on other channels, requiring a number of other channel realignments. In addition to all of the costs related to subscriber notification, channel realignment could require the replacement (or reprogramming) of the tens of thousands of traps currently in place in non-addressable systems.

---

[12] Additionally, in the ratemaking proceeding the Commission should consider the costs of prohibiting indecent and obscene programming (on both leased access and PEG channels), including the costs of monitoring programming and/or obtaining certifications from programmers.

B. The Commission Should Define "Single Channel" In A Manner That Maximizes Efficient Use Of Channel Capacity

The Act clearly mandates the Commission to require a cable operator to aggregate all indecent leased access programs on a "single channel."[13] The Act does not, however, mandate that the Commission require the rest of that "single channel" be warehoused for indecent programming. The costs described above that would result from warehousing an entire channel could be mitigated if the Commission defines "single channel" in a manner that requires indecent programs to be carried (and scrambled) on a single channel but permits the operator to use the remainder of the channel for non-indecent (and non-scrambled) leased access programs. This is a far more reasonable solution that still meets the mandate of protecting children.

Most of Continental's systems have few, if any, leased access program hours per year — let alone per week or per day. If those systems were required to set aside an entire channel in order to carry a few hours of indecent programming each year, no one could afford to choose the single channel option and incur the associated disruptions and costs. Further, with channel space at a premium, cable operators cannot afford to devote two channels to leased access programming that would otherwise fit on a single leased access channel. Despite the proliferation of recent press articles concerning future promises of digital compression and other technologies, today's reality is that channel capacity for most cable systems is extremely limited and in high demand. Without the flexibility to scramble part of a "single channel," cable systems either would be forced to ban such programs or would encounter overwhelming economic costs and greatly disserve their subscribers, who would otherwise be able to receive an additional program service.

The Commission can mitigate the costs and burdens of restricting access by permitting the operator to aggregate and

[13] Act at 10(b).

scramble all indecent leased access programming on a single channel, while still providing non-scrambled leased access programming the rest of the day on that same channel. Nothing in the Act or legislative history prevents the Commission from defining "single channel" to permit this flexibility. Indeed, to define it in a way that would require unnecessarily inefficient use of channel capacity would essentially ensure that cable operators would have no choice but to opt for a prohibition, thereby converting the option into a *de facto* ban in direct contravention of congressional intent and constitutional mandates.

C. The Commission Should Delay The Effective Date Of The Rules Relating To The Single Channel Requirement To Permit Implementation

In light of the technical changes that will need to be made, both at the cable head end to scramble the signal and at the customers' premises to replace and provide properly programmed traps, cable operators must be afforded sufficient lead time to implement the single channel requirement. Continental requests that the Commission exercise its authority under the Act and delay the effective date of the regulations related to the single leased access channel for 120 days after the final regulations are adopted.[14] During this time, the cable operators will be able to purchase and install the necessary equipment in order to comply with the regulations, as well as to engage in consumer education to inform subscribers of the changes in cable operations.

Given the enormous changes that must be made to cable systems to implement the single channel requirement, a 120-day implementation period should be provided. Continental Cablevision of Greater Dayton (Ohio) is a typical non-addressable system. In order to meet the single channel requirement, the Greater Dayton system would first have to identify a separate channel for indecent

[14] Unlike other provisions of the Act, the provisions governing single access channel restrictions are not self-executing. While Congress provided that the Commission must enact regulations within 120 days of passage of the Act, it did not specify the date by which time the regulations must become effective.

leased access programming, which would also likely entail channel repositioning. It would then need to scramble that channel, order the necessary traps, and then deploy service trucks and service technicians to install those positive traps in all homes in which subscribers affirmatively requested the programming.

Even in addressable systems, a 120-day implementation period is needed. Because virtually no currently installed addressable cable converter scrambles the audio portion of the television signal, addressable systems would still need to purchase a jamming type of scrambler and install positive traps. Indeed, in some fashion the burden in addressable systems would be greater. Having invested in advanced addressable technology precisely to avoid the expense of buying and physically installing traps, systems with addressable technology would now have to purchase test equipment and traps solely for the purpose of scrambling indecent leased access programming.

The operator's ability to take these implementation steps, in both addressable and non-addressable systems, within the 120-day period will depend in large part on factors beyond its control, *e.g.*, the volume of subscribers who want to receive the indecent programs and the availability of scramblers and traps for purchase. Given these uncertainties, Continental urges the Commission to adopt a 120-day effective date, with provisions for a waiver upon a showing of good cause that the implementation period, on a case-by-case basis, must be extended.

Without such a lead time, cable operators will be unable to comply with the single channel requirement and will have no choice but to prohibit all indecent programs. The result, in violation of the Act and the Constitution, would be a *de facto* ban.

D. The Commission Should Impose A 45-Day Notification Requirement By Leased Access Programmers With Indecent Programming

Under the Act, programmers are required to inform cable operators if the material to be presented on the leased channel contains indecent material.[15] The Commission requests comment on "what would be a reasonable time frame for the required notification by a program provider to the cable operator. . . ."[16] In the proposed regulations, however, the Commission, without any explanation, proposes seven days as a "reasonable timeframe" for the requisite notice to the cable operator.[17]

Quite simply, seven days is not a reasonable or sufficient amount of time for the cable operators to receive notification of indecent programming and arrange to move such programming to a single channel and scramble it pursuant to a programmer's notification. For example, even if a program is certified as indecent, operators may still need to review it to be certain there is no obscene material. *See supra* at 4-6. Furthermore, in certain communities such as University City, Missouri, Continental provides government authorities with a monthly guide to the next month's leased and PEG access programming. This guide is published as much as one month prior to some access programming, requiring substantial advance notice from programmers.

The Commission also asks "whether such notification should be made in writing."[18] Continental urges the Commission to require programmers to provide such notification in writing to the local cable system. By so doing, there will be less likelihood of miscommunications. Further, in Continental's view it is essential that a cable operator "be held harmless from liability . . . if it does

---

[15] Act at § 10(b).

[16] NPRM at ¶ 12.

[17] NPRM at Appendix A, Part 76 2(c).

[18] NPRM at ¶ 12.

not receive any, or timely, notification from a programmer."[19] Any other rule would be grossly unfair in light of the Commission's conclusion that "[u]nder Section 10 it is the program provider, not the cable operator, who must determine if a program is indecent and, hence, must be provided on the blocked channel."[20]

E. The Commission Should Require A 30-Day Advance Written Notice Of A Subscriber's Desire To Change Access To Indecent Programming

A final issue the Commission should address concerns the timing and form of the notice subscribers must give to the cable operator if subscribers wish to change the status of their access to indecent programming on leased access channels. In particular, cable operators must have sufficient time to comply with a subscriber's request to block access to the indecent programming that had previously been transmitted to the subscriber's home pursuant to the subscriber's consent. In the absence of such a rule, an operator could be held liable for transmitting indecent programming in violation of the Commission's rules.

Continental urges the Commission to adopt a rule giving the operating company 30 days to implement a customer's request to change access to indecent programming. During this time period, the operator will be able to install or remove the individual trap from the subscriber's home. Further, the Commission should clarify in its order that cable operators will not be held liable during this 30-day period if a subscriber continues to receive unscrambled indecent programming.

Finally, to protect against fraud and miscommunications, the Commission should permit operators to require that all subscriber requests to change their access to indecent programs be in writing and include the name, address and account number of the subscriber. Such a requirement will help eliminate the possibility that unauthorized people will make fraudulent requests to the cable

---

[19] Id.

[20] *Id.* at ¶ 10.

company to unscramble indecent programming at another subscriber's home.

CONCLUSION

For the foregoing reasons, Continental respectfully requests that the Commission implement regulations on indecent and obscene cable programming that (1) provide operators with sufficient power to prohibit obscene programming on PEG and leased access channels in a minimally intrusive manner, (2) preempt inconsistent state and local regulations and franchise agreements, and (3) do not impose onerous cost or procedural burdens, thereby resulting in a *de facto* ban on indecent programming on leased access channels.

Respectfully submitted,

/s/

Robert J. Sachs
Howard B. Homonoff
CONTINENTAL CABLEVISION, INC.
Pilot House, Lewis Wharf
Boston, MA 02110
(617) 742-9500

/s/

Diane S. Killory
Mary K. O'Connell
MORRISON & FOERSTER
Suite 5500
2000 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 887-1500

December 7, 1992

Cover Omitted

Table of Contents Omitted

Summary Omitted

FCC Caption Omitted

COMMENTS OF COX CABLE COMMUNICATIONS, A DIVISION OF COX COMMUNICATIONS, INC.

* * *

The Commission must also enact regulations to enable cable operators to prohibit the use of public, educational and governmental ("PEG") channels for any programming that contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct. Finally, Section 10 eliminates an operator's immunity for carrying obscene material on leased or PEG access channels.

Cox submits that the mandatory provisions of Section 10 of the Cable Act are unconstitutional. While this is not a determination that Congress has authorized the Commission to make, the Commission, in implementing this provision, must minimize the unconstitutional impact of this provision on constitutionally protected speech. To do so, the Commission's rules must insulate cable operators from liability for not censoring protected speech.

The Commission should also recognize that cable operators need flexibility in complying with this law.

* * *

Through Section 10, Congress has impermissibly "deputized" cable operators to act as censors of constitutionally protected speech. Placing the initial notice requirement on programmers does not cure the constitutional infirmity of this provision. The Commission's rules must take the next step and limit an operator's control obligations solely to reviewing and acting in good faith on a programmer's certification and not requiring an operator to review the programming itself. Once an operator performs these obligations, it cannot face even limited liability for failing to shift the programming to the blocked access channel.

* * *

Otherwise, operators may be unwilling to carry constitutionally protected speech. In keeping with the permissive nature of the PEG provision, operators must be given the flexibility to determine the extent to which they will monitor programming for such material. A rigid definition of "material soliciting or promoting unlawful conduct" is probably impossible to achieve in this context.[11]

Conclusion

The Commission's primary obligation in this rulemaking is to minimize the unconstitutional elements of Section 10 by immunizing cable operators from liability if they comply in good faith with its provisions. While Congress has impermissibly imposed censorship duties on cable operators, the Commission must minimize the chilling effect of these provisions. Cable operators simply cannot be required by the government to investigate, evaluate and control constitutionally protected speech.

---

[11] However, in the interest of reducing uncertainty in the area of constitutionally protected speech, the Commission should clarify that it interprets "sexually explicit conduct" to have the same meaning as "indecent program material." Senate drafters of this provision appear to have intended the phrases to be synonymous. *NPRM* at 6, n.11.

* * *

Respectfully submitted,

COX CABLE COMMUNICATIONS,
A Division of Cox Communications, Inc.

By /s/
Brenda L. Fox
David J. Wittenstein
Michael J. Pierce

Its Attorneys

Dow, Lohnes & Albertson
1255 - 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

December 7, 1992

FCC Caption Omitted

**COMMENTS OF
DENVER AREA EDUCATIONAL
TELECOMMUNICATIONS CONSORTIUM, INC.
ON NOTICE OF PROPOSED RULE MAKING**

Denver Area Educational Telecommunications Consortium, Inc. ("DAETC") hereby submits the following comments regarding the policies and conditions proposed in the above-captioned proceeding.

I. Background on DAETC and its Program Service, The 90's Channel

Description of The 90's Channel

DAETC began programming leased access channels in late 1989.

DAETC's program service in known as The 90's Channel.[1] Although DAETC is non-profit, as are its cable programming efforts, The 90's Channel carries advertising. Since it is a "basic" program service, cable subscribers do not pay extra to receive the channel.

The 90's Channel carries a wide variety of material, much of it both controversial and otherwise unavailable to its viewers. It transmits documentaries and magazine programs on topics which have included: the Persian Gulf War, environmental contamination, racism, US-Cuba relations, union organizing, the status of recent immigrants, issues of concern to Native Americans, the Palestinian uprising, the US invasion of Panama, the Iran-contra scandal, urban

---

[1] Because The 90's Channel is DAETC's chief cable programming effort, herein the terms "The 90's Channel" and "DAETC" will be used essentially interchangeably.

gangs, prison conditions, art censorship, gay rights, prostitution, and AIDS.[2]

Most programs carried on The 90's Channel express opinions in addition to reporting facts. Most of the opinion is liberal. If The 90's Channel were a publication, then, it would have more in common with *The New Republic* than the New York *Times*.

Much of the material shown on The 90's Channel is recorded with portable video cameras in a verite or semi-verite style. The channel has carried more than 20 hours of programming from a source known an CamNet, which is described in several articles attached hereto as Appendix A. As Appendix A shows, critics and observers have often commented on the immediacy, unvarnished quality, and the "realness" of such portable video work.

The 90's Channel delivers its programming to cable systems on videotape, which is played on automated equipment. Generally, there are two fresh hours of programming each week, which are repeated around the clock. The channel's present equipment makes it difficult to run different programs at different times of day, since manual tape changing would be required. The "round the clock" nature of the programming has provoked complaints, since material oriented toward adults runs during daytime hours.[3] The 90's Channel has voluntarily refrained from transmitting certain meritorious programming because we are not yet equipped to run it only during evening hours.

A small but important portion of The 90's Channel's programming deals with sexuality. Such material cannot be extricated from coverage of matters such as gay rights, AIDS, art censorship, and prostitution. Although the channel has never carried a full-length program that dealt with sexuality *per se*, certain

---

[2] Originally, the channel's programming consisted of *The 90's* magazine series. However, in 1991 the Public Broadcasting Service acquired all new episodes of *The 90's* on an exclusive basis, and the channel was forced to diversify its program sources.

[3] This material deals with topics which are not readily comprehensible to children, but is in no way "adult" in the sense of pornography.

magazine segments have been about sex. Appendix B to these comments describes a number of program segments dealing with sexuality which The 90's Channel has carried.

As well, the unvarnished quality of certain programming on the channel means that it includes profanity; some common profane terms are of course sexual or excretory in character.

The 90's Channel pre-screens and carefully assesses the programs it carries. Our executives personally respond to viewer comments and complaints. We have had long, heartfelt conversations with viewers who were offended by material we transmitted. Although we carry programming which other networks would exclude, it is not because we have failed to weigh the implications carefully.

DAETC and the Difficult History of its Current Channel Lease

DAETC is a Colorado non-profit corporation formed in 1983. In 1986, DAETC entered into an agreement to lease full-time channels on eight cable systems operated by United Cable Television Corporation ("United").[4] The term of this lease commenced in 1987.

In 1987, when DAETC was prepared to transmit programming pursuant to the channel lease with United, United refused to honor the lease. DAETC subsequently sued United in state court in Colorado, where both entities were headquartered. After a substantial period of litigation, DAETC and United entered into a settlement agreement by which United agreed to provide the leased access channels. The state court judge hearing the case accepted the settlement agreement by court order, and retains supervision of the matter to insure adherence to the terms of settlement.

---

[4] Those systems are: Alameda, CA; Scottsdale, AZ; Denver (suburbs), CO; Hacienda Heights and San Fernando Valley, CA (both in Los Angeles County); Vernon, CT; Baltimore, MD; and Oakland County, MI. Today, these cable systems serve over 500,000 subscribers. Pursuant to the channel lease agreement, DAETC's programming is to be carried on the lowest tier of service.

After DAETC began programming the leased access channels, United was merged into United Artists, forming a company known as United Artists Entertainment ("UAE"). UAE was majority owned by Tele-Communications, Inc. ("TCI").

In September, 1990, the management of UAE's East San Fernando Valley system removed all 90's Channel programming from the air because it found the content to be objectionable. This removal was in direct violation of the quondam terms of Section 612 of the Communications Act, which at that time specified that cable operators were to exercise no control over the content of leased access channels. DAETC was forced to hire attorneys and threaten the resumption of litigation before it was able to regain editorial control over its leased channel on the East San Fernando Valley system.

Subsequently, TCI acquired 100% ownership of UAE, and assumed direct control over the systems on which DAETC leases channels.

The manager of at least one TCI system has made it clear that she wants The 90's Channel removed from the air an soon as possible. Several others have expressed concern about the fact that they have received viewer complaints about controversial programs. These managers aver, and DAETC agrees, that viewers are often unaware that the cable company cannot control the content of programs on leased access channels.

In August, 1992, DAETC received a letter from a TCI executive which claimed, erroneously, that the United-DAETC channel lease agreement was to expire on October 31, 1992. As a result, DAETC has filed a motion in Colorado state court seeking a ruling that, *inter alia*, the term of the applicable channel lease agreement will not expire until November 1, 1995, at the earliest.[5] This matter is pending in Colorado state court, and The 90's Channel remains on the air. TCI and DAETC have entered into settlement negotiations, which are continuing.

---

[5] In addition, the United-DAETC channel lease provides for certain further renewal rights, at DAETC's option.

DAETC's relationship with United and its successors has been consistently difficult. As well, Congress has found that cable operators have evinced a general pattern of hostility toward channel leasing. For instance, the Senate Report to the Cable Consumer Protection and Competition Act of 1992 ("1992 Act") states:

> For irrefutable evidence of the failure of the leased access provision, one need look no further than the marketplace. Despite widespread instances of dropping of local broadcast stations and refusals to carry competitive program services, there is no evidence that excluded programmers have been successful in gaining access through Section 612 . . .
>
> . . .The cable operator in almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer . . . [6]

II. Background on Indecency-Related Issues Posed by the 1992 Act

The Indecency Standard

Although indecency has been considerably litigated as a legal standard it cannot be applied with unfailing accuracy.[7] With regard to the indecency definition which the Commission proposes in its Notice of Proposed Rule Making ("NPRM") in the above-captioned matter, one has to assess what is "patently" offensive under

---

[6] Senate Report 102-92 at p. 30. Footnotes omitted. The first quoted paragraph is an excerpt from the testimony of Preston Padden contained in Senate Report 102-92.

[7] In DAETC's view the indecency provisions of Section 612 of the 1992 Act are unconstitutional. However, since the Commission is required to implement these portions of the statute until they are stayed or overturned — an unknown period of time — DAETC has elected to participate in this proceeding.

"contemporary community standards."[8] By the plain wording of the phrase "contemporary community standards," such standards can change over time. As well, they are likely to vary from community to community. Perhaps more importantly, different individuals in any given community will possess radically different notions of what is or is not patently offensive. Thus, generally without the benefit of quantitative methods, programmers have to determine the balance of opinion in a given locality at a given time with regard to innumerable specific program segments.[9]

Congressionally Mandated Rule Making Issues

The NPRM in the above-captioned proceeding responds to the requirement established by Section 612(j) of the 1992 Act. As noted in the NPRM at pp. 3-4, the Commission in required to adopt a definition of indecency, and to establish procedures for the handling of indecent material on leased access channels, if such material is not voluntarily prohibited by the cable system operator.

Section 612(j) in effect penalizes cable operators for not voluntarily banning indecent material in that they are required to designate a special scrambled channel. Most cable operators today perceive channel capacity to be scarce. DAETC believes very few cable operators will want to set aside an entire channel for indecent material carried by leased access programmers.

Important Issues Raised by Self-Effectuating Portions of the Statute

Two important provisions of the 1992 Act pertaining to indecency are self-effectuating. Both are contained within Section 612(h).

---

[8] NPRM at p. 4.

[9] The task facing adjudicators is easier only in that they need examine many fewer programs, and thus can take much more time to study each instance of possible indecency. Under these circumstances, it is possible to undertake more extensive research into what is or is not patently offensive to various groups within a given community. Even with this advantage, the Commission itself on occasion has been forced to anguish over what is indecent; its adjudication of political advertising which contained gruesome images of aborted fetuses provides a recent example.

First, cable operators are authorized "to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner an measured by contemporary community standards." As noted above, operators are in effect penalized for refraining from implementing such a policy, in that they are required to set aside a scrambled channel for indecent programming.

Second, as already quoted above, effective December 4, 1992 cable operators were given the power to refuse to carry a leased access program service, if in the judgment of the cable operator such service is "obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States."[10]

Although these provisions are self-effectuating, DAETC believes that they are the most critical, in that DAETC expects that the vast majority of cable operators will adopt prospective policies and/or ban channels rather than be forced to reserve scrambled channels for indecent programming.

Other Pertinent Provisions of the 1992 Act

Section 612(c)(4)(a)(ii) of the 1992 Act authorizes the Commission to establish reasonable terms and conditions for the use of leased access channels. Section 612(c)(4)(a)(iii) authorize, the Commission to establish procedures for expedited resolution of disputes concerning leased access rates or carriage.

III. Over-broad Application of the Act by Cable Operators

As described above, self-effectuating portions of the 1992 Act delegate to cable operators important powers with regard to

---

[10] This provision also allows the operator to carry the service subject to conditions. Unlike the other Section 612(h) provisions herein described, there in no explicit standard of reasonableness required for the removal or attachment of conditions to leased access program services which the cable operator judges to be obscene, indecent, or possessing the other characteristics listed in the statute.

obscenity, indecency, and similar matters as they pertain to leased access.

However, unlike the Commission or the courts, cable operators are not neutral judges of indecency. DAETC's experience is that United and TCI have shown great resistance to the notion of leased access in general, and Congress came to a similar conclusion about the industry as a whole when it drafted the 1992 Act. UAE, and, to an extent, TCI, have been hostile toward controversial programming carried on DAETC's leased access channels. This animus is at least in part understandable, since viewers often believe that the cable company is responsible for programs that offend them.

As of this date, TCI has not supplied DAETC with a written policy pertaining to indecency on leased access channels, despite the fact that the statute authorizes TCI to implement one. DAETC has been given to understand that TCI does plan to adopt a policy an indecency in the future, however.

In the absence of a written policy, DAETC cannot be sure of TCI's stance. However, DAETC has been informed that highly and unnecessarily repressive policies are under consideration in the industry.

Under the contemplated policy described to DAETC by knowledgeable industry personnel, leased access programmers would be required to represent and warrant that their programming is not indecent. If even a single breach of representation and warranty occurs, the offending programmer would be taken off the air permanently, or its channel would be scrambled in the manner described in Section 612(j)(1). If a leased access program provider refuses to provide the required representation and warranty, the penalty would be the same as that for breach.

A policy imposing such draconian consequences for programmer error, if implemented by a cable operator, would go far beyond the intent of the statute to protect children from indecent programming.

In DAETC's estimation, the only certain way to avoid presenting indecency is to eschew not only that which is indecent,

but also that which a hostile cable operator arguably could hold to be indecent in the most conservative locality served. Such an approach will inevitably lead to the blocking of meritorious programming which is not indecent.

Until the indecency provisions of the 1992 Act are enjoined or found to be unconstitutional, the 90's Channel is of course resolved to comply with the law. However, we are adamantly opposed to procedures which force us to self-censor all materials that approach the margins of indecency.

IV. DAETC's Recommendations for Commission Action

As noted in the NPRM, Commission has recognized its obligation to implement the Act in the most constitutionally permissible manner,[11] i.e. the least restrictive manner needed to protect children from indecency.[12]

Self-Effectuating Provisions of the 1992 Act

DAETC believes that, given the Commission's obligation to implement the 1992 Act in the most constitutionally permissible manner, it must establish rules and policies concerning the self-effectuating portions of the 1992 Act. Commission involvement in self-effectuating provisions will prove especially important, because vast majority of cable operators will adopt prospective policies pursuant to Section 612(h), mooting the rules adopted pursuant to Section 612(j). DAETC points out that among the triangle of interested parties — the cable operator, the channel lessee, and the Commission — only the Commission is neutral. The 90's Channel's experience establishes that cable operators cannot be relied upon to be impartial judges of indecency, and that such a state of affairs is natural since their paying subscribers hold them responsible for programming they find offensive.

---

[11] NPRM at p. 4.

[12] See *Sable Communications v. FCC*, 109 S. Ct. 2829, 2836 (1989).

At paragraph 11 of the NPRM, the Commission inquires as to whether cable operators can require certifications regarding indecency and/or obscenity from channel lessees.[13]

In these comments, DAETC has described circumstances in which certifications can be used in a highly and unnecessarily repressive manner. If the penalties associated with actual or putative breach of certification are severe, the result will go far beyond protecting children from indecency; rather, the effect will be to chill a wide variety of speech which is not indecent.

DAETC believes that the Commission should permit the use of certifications only under conditions which it proscribes and monitors, including the following:

1) The cable operator must be barred from removing, scrambling, or otherwise harshly penalizing a leased access programmer based on a single instance of indecency in breach of certification, or based on a small number of instances over time;

2) Disputes over the indecency of individual programs or program segments between the cable operator and leased access programmer must be appealable to the Commission, or another neutral adjudicator;

3) If a cable operator wishes to remove, scramble, or otherwise harshly penalize a leased access programmer on the grounds of indecency, it must give advance notice of such a contemplated action to the programmer in writing, and the programmer must have the right to appeal such planned action to the Commission before it takes place.

DAETC believes that the above conditions are appropriate for two reasons. First, as already described, the cable operator cannot be relied upon as a neutral adjudicator of indecency. Secondly, DAETC observes that cable operators remain protected from

---

[13] The Commission states: "We assume that cable operators who have a written and published policy of prohibiting indecent material may require such certifications." (NPRM at p. 6.)

liability under Section 638 of the Act for the transmission of indecent programming.

DAETC recognizes that cable operators' statutory immunity under Section 638 has been removed with respect to obscene material, and that obscenity is not constitutionally protected. However, DAETC believes that the above-listed protections should also apply to allegedly obscene material, since the 1992 Act allows operators to adopt policies refusing to transmit any individual program they believe to be obscene — at least until the question of obscenity is adjudicated as to that program. To permit harsher sanctions for breach of certification with regard to obscenity invites operators to abuse their discretion by branding objectionable content obscene rather than indecent.[14]

Further, DAETC believes that because the Commission now has jurisdiction over the rates, terms, and conditions pursuant to which leased access channels are provided, it will inevitably become the forum for disputes between programmers and operators about indecency, obscenity, and related content issues affecting carriage. DAETC believes that the Commission should adopt expedited complaint resolution procedures for such problems, somewhat in the manner it presently does for Section 315 and related political broadcasting disputes.

Finally, DAETC believes that the Commission should clearly state that its rules and policies do not shield a cable operator from civil liability for breach of contract if the operator removes or bars programming that is not obscene or indecent.

Other Provisions of the 1992 Act

In the NPRM, the Commission inquires as to whether, under Section 612(j) of the 1992 Act, a cable operator is powerless to

---

[14] There is little reason to believe that such a regime is so lax as to encourage obscenity on leased access channels. Leased access programmers are subject to criminal prosecution for carrying obscene material.

require that indecent programming be carried on a blocked channel if the program provider fails to identify the program as indecent.[15]

DAETC points out that Section 612(j)(1)(A) of the statute is clear that cable operators are required to place all indecent programs *as identified by program providers* on a blocked channel. This provision does not give program providers unbridled discretion, however, or leave operators without recourse. Under Section 612(j)(1)(C) of the 1992 Act, programmers are required to inform cable operators if a program is indecent as defined by Commission regulations. The Commission or the courts have the power to sanction program providers if they fail to comply with the provisions of Section 612(j)(1)(C). As mentioned above, DAETC recommends that the Commission establish expedited complaint procedures regarding indecency, and, pursuant thereto, cable operators would be free to bring such matters to the Commission's attention.

Respectfully submitted,

DENVER AREA EDUCATIONAL
TELECOMMUNICATIONS CONSORTIUM, INC.

By: /s/
John B. Schwartz, President
P.O. Box 6060
Boulder, CO 80306
(303) 442-2707

Dated: December 4, 1992

---

[15] NPRM at p. 5.

Appendix A

ARTICLES CONCERNING CAMNET

Mark Robichaux, *Camcorders Spark Two Cable Ventures*, WALL STREET JOURNAL, July 30, 1992 at B1

Los Angeles—Cameraman Jay April sinks ankle-deep into a three-story-high compost heap, believed to be the largest in the Western world, and trains his camcorder on the heap's long-haired, bearded owner, who speaks only in rhyme.

Environmental zealot Tim Dundon, better known as Zeke the Sheik from the planet Bleak, is pontificating on the pile:

I mix it like pancake batter
To make the ladder of matter fatter,
But it doesn't matter
Because everybody thinks I'm as mad as a hatter.

At intervals, Zeke breaks into song. A favorite: "I Never Promised You a Rose Garden."

The footage will soon air on Camnet, a five-month-old cable network that shows mini-documentaries shot with camcorders by a cadre of aging video activists and artists. Started by two women from Venice Beach, Calif., Camnet eschews, anchors, reporters and hosts.

Correspondents have taped homeless poets, a skinhead picnic on the Mexican border, a visit to the Nixon Museum, a "Justice for Janitors" rally in Los Angeles and a guided tour of the Barbie doll inventor's prosthetic breast factory. Once Camnet lent a camcorder to Los Angeles gang members, whose woeful footage of life in their neighborhood drew tears from one video editor.

This isn't cute enough to be "America's Funniest Home Videos." And it's a far cry from NBC's "I Witness Videos," which is often grisly. It's *cinema verite* meets *vax populi*, a gentle amateur service from the handheld point of view.

Two-Hour Loop

The stories, some sober and serious, some arcane, air the last two weeks of every month to more than 828,000 homes in 10 cable systems from Los Angeles to Philadelphia. The same two-hour loop airs 12 times a day. "Think of television as food," says Mr. April. "We've been eating the same meat and potatoes served up by the networks since the 1950s. Now people are cooking more exotic dishes at home."

The attitude has drawn a cult-like following of young and old viewers. "They reveal as opposed to preach," says Victor Dinnerstein, a 46-year-old San Fernando Valley resident and Camnet fan. "It's a little off the wall, but it's pure insight."

Camnet is run on a budget not much bigger than the combined savings of cofounders Nancy Cain and Judith Binder. They met while working on "The '90s," a critically acclaimed, populist camcorder-based magazine show now in its fourth and final season on PBS. They like the concept so much that they decided it could work on a much bigger scale.

Ms. Binder had been an independent director with alternative theater troupes in Los Angeles. Ms. Cain and several other Camnet contributors are the same counter-culture video artists who roamed from loft to loft in New York in the late 1960s and early 1970s, watching each other's experimental videos on such topics as the trial of the Chicago Seven and Woodstock. They dubbed themselves the Videofreex and once transmitted homemade programming to a valley in upstate New York that wasn't being served by a broadcast station.

Camnet personnel still haven't exactly joined the Establishment. Advertisers are few despite the cheap rates. Sponsors can buy two dozen 30-second spots a day for a full week for $504. Editorial control, what little there is, lies entirely in the hands of Ms. Cain, a longtime freelance video producer, and Ms. Binder.

"We open the window a little wider, try to let things develop a little more," says Ms. Binder. "Sometimes we succeed, sometimes we fail, but we're willing to risk the process to find the truth."

The two edit tapes sitting side by side before two 13-inch monitors in a small backroom of Ms. Cain's Venice Beach house, which is littered with videocassettes. On the wall are pictures of President Bush and former presidents Reagan and Nixon. "They inspire me," Ms. Cain remarks, deadpan.

The pair seek a seamless tapestry of footage when they edit, and they discourage their 17 or so correspondents from

ever turning the camera off during shoots. "Process is product," says Ms. Cain, "I have a high tolerance for raw tape."

One of the more prolific correspondents, if not the most passionate, is Mr. April, a militant environmentalist who sleeps in a giant green tent in his living room. He drives from shoot to shoot in a 1970 Karmann Ghia, hugging the broken driver-side door so it doesn't swing open on curvy mountain roads. On a sweltering California afternoon, he dutifully follows and records Zeke the Sheik as he points out areas of interest in his compost pile.

The footage isn't exactly broadcast quality. When the compost beneath his feet crumbles, Mr. April struggles for balance and the camera wobbles. He inadvertently coughs in the middle of a question, and an overhead jet muffles Zeke's voice. "It may not be technically perfect, but it's flat-out honest," he says. "This is gonzo journalism with a human touch."

Extinct Butterfly

What the network lacks in polished professionalism, it makes up in serendipity. Mr. April once stumbled on a group of real estate agents playing softball in a park whose construction drove the last known Palos Verdes Blue butterfly into extinction, in violation of the Endangered Species Act.

The cameraman approached a middle-aged couple sitting on bleachers and asked them solemnly, "Are you aware this was the last known habitat of the Palos Verdes Blue butterfly?" "I'm sorry to hear that," the woman responded politely, as she continued to watch the game.

Mr. April also shot a story on a coyote that was feasting on the poodles of the rich. It included interviews with the distraught pet owners and the county agent called to trap the coyote. The animal was eventually shown writhing in a trap, and minutes later, a single gunshot was heard off camera as Mr. April zoomed in on the agent's truck and its logo: Animal Control.

The agent, identified on camera only as Louie, told the camera he didn't feel good about killing the coyote. "What justifies this in my heart and in my mind is the pets I

save. Here I saved perhaps 10, 20 cats."

It was a classic Camnet moment — unstaged and otherwise unremarkable, a snapshot of life made more dramatic by its appearance on a TV screen. "If you point a camera and let people say what they want to say, nine times out of 10 it's more stimulating, more interesting than some reporter who's more concerned with the perfect part down his hair," says Mr. April.

Mr. April hopes for the day Camnet becomes a full-fledged network, but he says it has already spawned a revolution. "It used to be that Big Brother is watching us," he says. "Now, it's Little Brother."

Steve Weinstein, *A Cable Network About the Real Word*, LOS ANGELES TIMES, October 16, 1992 at F24

Television: The fledgling CamNet presents footage shot on 8mm cameras by activists, amateurs and artists. In Southern California, it is seen by about 100,000 viewers.

Inside the Democratic convention last July, a fledgling cable network, armed only with a home video camera, roamed the aisles alongside NBC, CNN and PBS. But while the establishment media aired the speeches and the spin of the assembled pols, the CamNet camera focused elsewhere. The constant milling and inattention of the delegates, the hot dogs and sauerkraut, a reporter complaining about the frequent evocation of God and the lack of anything healthy to eat.

"I'm actually for some sort of spirituality in school, but you can't have God, because what about the people who believe in the Goddess? What about the secular humanists?" said correspondent Beth Lapides from somewhere in Madison Square Garden. "You really can get lost in this place. You get hungry, you get thirsty and the food here is really awful. And that very much symbolizes how hungry Americans are for some real food. How hungry I am for something nutritious to eat is how hungry America is for something good."

The two founders of CamNet, a 6-month-old cable network that presents mini-documentaries and features shot on 8mm home-video cameras by a contingent of activists, amateurs and artists, have essentially the same philosophy.

"TV is boring. You flip through and every channel is the same thing," said Nancy Cain, who operates CamNet out of her Venice Beach home with her partner, Judith Binder. "CamNet stops you. If you're flipping around and you see this, it doesn't look like public access and it doesn't look like television, and it looks like something is happening, and it looks like it might be live and it looks like you might be right in the middle of it. It's very often riveting and exciting. It's NBC-Not."

Only about 1 million people can see it, however. CamNet is available on cable systems in only eight cities, including Denver, Baltimore, Detroit and Philadelphia. In Southern California, CamNet can be seen by about [illegible] viewers on United Artists Cable in the East San Fernando Valley and La Puente-Baldwin Park area.

Home video, of course, is no stranger to television. The video-taped beating of Rodney G. King changed the very history of Los Angeles. "America's Funniest Home Videos" turned home bloopers into a Top 10 network smash, and "I Witness Video" shows grisly home video of accidents and disasters.

But Cain and Binder contend that CamNet is not "exploitative," not out for the video "Boing!" that punctuates those other shows.

"We're really the opposite of what you can see on television," said Binder. "We're trying to show events, issues or lifestyles that haven't had their say-so before. We'd like to be a real alternative."

The idea was born out of PBS' "The 90s," the populist camcorder magazine series on which Cain and Binder served as producers. When the program, now in its fourth and final season, died, they decided to test the concept on a broader scale.

Many of the stories CamNet has produced reflect the artsy, unorthodox background of the network's founders, although Cain said that their only guiding philosophy is "freedom of speech."

Binder, who was moved by the power of Frederick Weisman's *cinema verite* documentaries, has worked as a director and videographer in the performance art scene. Cain was a member of the Videofreex, a group that toured the country in the '60s and '70s producing experimental videos on Woodstock, the Chicago Seven and geodesic domes. CBS actually commissioned a pilot of their work, but, Cain said, one executive "told me that it was five years ahead of its time. He was wrong. It was 20."

The CamNet pieces — some sad, some funny, some haunting — include a visit to a condom store on Melrose Avenue to learn about teen-age sexual behavior, skinheads taunting Mexicans along the border, a trip to the Richard M. Nixon museum, a day in the life of New York City squatters

and a demonstration in Washington in the aftermath of the King beating verdict.

About 20 correspondents around the country tape these stories on their own cameras and send the raw footage to Venice, where Cain and Binder sit side-by-side at a tiny editing bay in the back of Cain's house. The duo trim and craft the raw tape into *cinema verite* reports — very few CamNet pieces contain narration — producing four hours of programming each month that is shown in repeated cycles.

Reaction has been mostly positive, Binder said. "Those who hate it call it a communist plot, but most people seem to love it." The city of Alameda threatened to sue CamNet over its somewhat clinical look at a woman and the device she uses for sexual stimulation, Binder said, but that has been the only serious complaint.

Their office receives phone calls almost every day from viewers who want to help them expand into other areas. One teacher at San Fernando High School uses the CamNet reports in his civics classes. And Barbara Brownell, a North Hollywood mother of three who discovered her teen-agers watching CamNet one day, was so "turned on" by it that she went out and bought her own camera and started making tapes.

"It's very intimate and very real," said Brownell, who just shot a piece on a homeless man who warms his food on his car engine. "You can get people to say things that they would never say to a big camera with a crew and a big microphone boom. Just by turning on this little camera and pointing it at someone you can discover the kind of charming and incredibly poignant human stories that would never happen with Ted Koppel."

Cain and Binder are financing the venture primarily out of their own pockets, paying their correspondents "essentially nothing." Advertisers are scarce, even though one week of hourly ads costs just $504, or $3 per spot. One of CamNet's most reliable sponsors, a Long Beach electronics store, burned down during the L.A. riots.

Nevertheless, Cain and Binder pledge to persevere. They brim with optimism that they will find their way onto

thousands of expanding cable systems and make money for themselves and their dedicated contributors. They continue to seek underwriting from several companies that are compatible with their philosophy, and a Tokyo firm is interested in airing CamNet on late-night television in Japan, Cain said.

"I think that some rich Asian newspaper magnate is going to want to get into television or [the head of a huge cable conglomerate] is going to see something about us and say, 'I'm sorry I didn't return your calls, but now I believe in you,'" Cain said. "I'm convinced that there is a market for us just like there is a market for Ted Turner's cartoon channel. I mean, how many of these same old cartoons can you look at?"

Joe Rhodes, *Video: Power to the People*,
TV GUIDE, November 28, 1992

CamNet, America's first all-camcorder channel, shows life on the fringe

When it premiered last March, CamNet — America's first all-camcorder network — became a sort of non-establishment C-SPAN. While cable-supported C-SPAN covers power in Washington, CamNet's army of unpaid photographers serves up raw, and often fascinating, scenes from the fringe that the traditional news media frequently ignore. And that, in turn, gives clout to people who don't hobnob with the elite.

CamNet has shown gang members' views of their neighborhood, rides on New York subways, racist skinheads at the Mexican border, and topless protesters outside the Democratic National Convention in New York City.

Each week, video vérité scenes like these are edited into a two-hour package that's continuously repeated on eight cable outlets reaching 819,000 homes.

"We think of it as real-life television," says Nancy Cain, who created CamNet with partner Judith Binder, and keeps it running from the back of her Venice, Cal., beach house. They hatched the idea when they saw how much camcorder material was available for PBS's *The 90's*, a series to which they contributed. With CamNet, they hope to, as Cain puts it, "demystify the media."

The cost is a mystery, though — Cain claims that CamNet has no working budget. They keep it going with their savings and a few small advertisers. But CamNet is designed to make a point, not a fortune. It's difficult to keep secrets when everyone has a camera, says Cain. As the Rodney King video showed, even government officials can't fight the power that ordinary citizens can wield with a tiny camcorder. — *Joe Rhodes*

MEDIA

[Cont. from 117]

ably offer their own cable TV programs in a few years.

These new phone, screen and satellite technologies make Ross Perot's mad vision of an electronic town hall inevitable. Perot was on the mark when he said his notion makes reporters crazy by making the White House press conference obsolete.

Reporters are also being shoved aside by a relatively low-tech opponent: video-driven, reality-based TV. How can a police reporter describe a murder when viewers can see one on *Cops?* What some producers call "unfiltered" programming, *Cops* is one of a whole generation of reality broadcasts — *Rescue 911, Code 3, Top Cops, Unsolved Mysteries, America's Most Wanted, Sightings, I Witness Video* — which prove nothing is more gripping than a real story. None of the broadcasts use what used to be called reporters.

This fall Time Warner unveiled New York 1 News, New York City's first twenty-four-hour local news channel. Local cable news operations already exist in Washington, D.C., California and New England, but the debut of New York 1 in the nation's largest TV market has gotten the attention of the thousands of journalists who live there, providing a showcase of the world to come. New York 1 News, and other cable channels expected to follow, will broadcast live high-school football games and City Hall tax hearings and Board of Education condom fights and four-alarm fires — things we used to need reporters to learn about.

In the United States anyone with a pen or pencil, a notebook, a still camera or a videocam — there are tens of millions — is a reporter. Some of them, like the amateur journalist who shot the police beating of Rodney King, will break the biggest stories in the country. They will provide the manpower, the audience and the voice for the next step in the evolution of information: the People's News.

The inevitable successor to the old and new kinds of transmitting stories, the People's

News will make journalists out of all of us and plug us back into the political system in ways that would have had the radicals who founded the nation's media dancing in their cobbled streets.

The People's News is, in fact, already on the air, although most journalists have never heard of it. It is CamNet, a nine-month-old cable network that airs documentaries and features shot on Hi-8mm video cameras by amateurs, artists, activists. Like Ted Turner's belittled vision of CNN a decade ago, CamNet is the brilliant vision for the next decade and beyond. Founded in a back room of a Venice Beach, California, home by two former PBS producers, CamNet has no corporate backing or market research. Just twenty picture makers scattered around the country. CamNet is so far available in only eight cities, including Los Angeles, Denver, Baltimore and Philadelphia. But it or something like it is coming soon to a TV set near you. It's the inevitable next stop in the liberation of television from network owners and broadcasters and its evolution as a medium that can interact with millions of people and return TV to individual Americans, a process Clinton, Perot and Brown legitimized.

CamNet's pieces are eclectic, odd, funny, haunting, spontaneous and strikingly apart from slick commercial-TV production values. CamNet stories include condom stores in L.A., skinheads taunting Mexicans along the border, the Richard M. Nixon museum, a Washington, D.C., march against police brutality.

"You really can get lost in this place," a CamNet correspondent reported during the Democratic Convention in Madison Square Garden. "You get hungry, you get thirsty, and the food here is really awful. And that very much symbolizes how hungry Americans are for some real food." CamNet returns individual, idiosyncratic, untutored voices to broadcasting, where the whole culture of TV journalism — pollsters, blow-dried reporters and anchors, advocates, spokespeople and lobbyists — is structured to keep them off. The People's News will show *us* in the mirror, not just them.

There may be lots of good reasons why reporters need to survive and why the current structure of journalism ought to

be preserved. But if they do exist, the media need to start articulating them.

So far the media, like the White House during 1992, show few signs of seeing themselves in crisis. The New News is largely still poohpoohed as unnerving, slightly dangerous and frivolous mush. Newspapers still run black-and-white pictures of events the rest of us saw twenty-four hours earlier in color, and white, middle-aged men in suits still sit behind evening-news anchor desks and say nothing much in grave and mellifluous voice.

Time does finally seem to be getting short. Perot's bloody loss did not reaffirm the media's importance or service to the republic. Quite the opposite. Like Marley's Ghost, his campaign brought with it visions of the future nobody wants to see.

The blunt reality is this: In a world where everybody is a journalist, then nobody really is. Journalists derived their power and special place in the country from the fact that they got to see history and relay it to us. If we're all seeing history as it unfolds and taking the pictures ourselves, then journalists seem increasingly, and sadly, doomed to follow the lumbering, awkward and poorly adapted institutions they work for into the country's history. The 1992 campaign and the technological revolution that is charging along on its heels suggest the death of the reporter is just a few channels away.

Appendix B

Program Segments Carried by The 90's Channel Dealing with Sexuality

"Self-help." A women's health organization in Austin, TX seeks to demystify gynecology, teaching women how to perform their own pelvic examinations. The organization's director is interviewed on the intimidating nature of gynecological procedures, and an internal examination is shown. A woman's pudenda are visible.

"Mapplethorpe Exhibit." The controversy over the Robert Mapplethorpe exhibit at a Boston art museum. Interviews with attendees are interspersed with images of many of the photos, including some of his most dramatic nudes. One man protests that $30,000 in government funding was spent "to put picture frames around these hideously obscene pictures." A woman observes that while nudes of women are common, Mapplethorpe is one of the few photographers who celebrates the beauty of the male body. She speculates that this quality is threatening to certain men. The museum director says he thinks that the exhibit has brought important issues concerning racism and homophobia into the public debate.

"Abortion Protest." This piece documents performance art by Elise Millikan. Millikan appears in front of a billboard which overlooks a New York street, and which bears the image of a giant coat hanger. She removes her overcoat, and, naked, performs a simulated self-abortion. She screams. Red liquid splatters copiously, staining considerable portion of the billboard. Interviews follow with passers-by and with Millikan. She says: "The government doesn't own my body. The government doesn't own my art. So hands off."

"Fertility Festival." Images and sounds from the annual fertility festival in Iuyama, Japan, complete with bright costumes

and a street procession. Many of the objects carried by marchers are totems shaped like penises.

"The Kind and Di." Di, a Los Angeles woman, buys a dildo. This is her first-person story of why and how she did it. It develops that she is disillusioned by the phoniness of courtship, and depressed that she is not in love. In a decision she admits is bitter-sweet, she resorts instead to a sexual device. She holds up the dildo, which is made of clear plastic and shaped like a penis. She switches it on. She discusses its features and pleasures with Judith Binder, who both operated the portable camera and produced the piece.

Cover Redacted

COMMENTS OF INTERMEDIA PARTNERS

Table of Contents Omitted

SUMMARY OF ARGUMENT

InterMedia Partners believes that the so-called "voluntary" prohibition of indecent material and other types of programming on cable television leased access and public, educational and governmental ("PEG") channels, violates the First Amendment of the Constitution. Nevertheless, InterMedia believes that it is compelled to ban such programming in order to avoid potential liability for the exhibition of certain programming which are shown on channels it does not control. Any rules established by the FCC must provide cable operators flexibility to adopt workable program policies. This includes permitting cable operator to: (1) require appropriate certification and indemnification; (2) terminate a user's access to a channel if that user violates the operator's program policy; (3) require that certain programs be placed on a "blocked" leased access channel; and (4) pre-screen and prohibit the exhibition of any program that the operator reasonably believes is obscene, indecent or solicits or promotes unlawful conduct.

InterMedia recognizes that the FCC is obligated to implement the 1992 Cable Act, and in particular Section 10 of the Act. Therefore, in order to promote the public interest and to establish a consistent body of case law, the FCC must assert exclusive jurisdiction over the enforcement of any regulations promulgated pursuant to Section 10. Specifically, the FCC must preempt state and local regulation of program content, establish a national standard for defining indecency, and adjudicate disputes among

cable operators, programmers, leased access channels lessees, and PEG users.

Finally, the FCC must recognize and make some accommodation in its rules for the added time and expense that will be required to technically "block" leased access channels which may exhibit indecent programming. The cable operator should not be required to absorb the costs of implementing Section 10. Moreover, the FCC must consider these costs in its ratemaking proceeding on leased access channels.

FCC Caption Omitted

COMMENTS OF INTERMEDIA PARTNERS

I. Introduction

InterMedia Partners ("InterMedia"), by its attorneys, hereby submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.

InterMedia owns and operates cable systems throughout the United States. InterMedia currently provides commercial leased access channels pursuant to Section 532 of the Communications Act of 1934, as amended (47 U.S.C. § 532) ("the Communications Act"), and public, educational and governmental ("PEG") channels pursuant to the requirements of InterMedia's various franchise agreements. InterMedia is obligated to lease access channels to individuals pursuant to 47 U.S.C. § 532(a). Franchising authorities have a similar interest in promoting the use of PEG channels.

The purpose of the instant proceeding is to promulgate regulations so that cable system operators may take all necessary and lawful steps to limit their liability for program content on leased and PEG access channels; channels over which operators have virtually no control. Accordingly, InterMedia has a direct

interest in the outcome of this proceeding and submits the following comments in response to the FCC's NPRM.[1]

II. "Voluntary" Prohibition of Indecent Programming on Leased and Peg Access Channels

A. Threat of Litigation Does Not Make Programming Policies "Voluntary"

Section 10(a)(2) of the Cable Consumer Protection and Competition Act of 1992 (hereinafter "1992 Cable Act") permits cable operators to "voluntarily" establish a "written and published policy of prohibiting programming" that the cable operator "reasonably believes" contains obscene and/or indecent programming on leased access channels. Section 10(c) allows operators to "voluntarily" prohibit "sexually explicit conduct" and "material soliciting or promoting unlawful conduct" on PEG channels.

In fact, because Section 10(d) eliminates cable operators' statutory immunity from liability for the transmission of obscene programming on leased and PEG access channels, such policies are hardly "voluntary." InterMedia anticipates that the practical result of Section 10 will be that cable systems will establish policies which ban all "questionable" programming altogether, applying the policy broadly in order to avoid liability. If the cable operator does not prohibit *potentially* obscene and indecent material, the alternative is to rely on the lessee's or PEG user's judgment as to what is indecent or obscene.[2] Clearly, there is a conflict in interest for the lessee/PEG user to self-censor its program material. Moreover, the "deep pockets" of cable operators are a likely target for lawsuits.

---

[1] While InterMedia is commenting in this proceeding, it wishes to make clear that it firmly believes these provisions violate the First Amendment of the Constitution, and InterMedia supports the efforts of Time Warner and others to strike them down in Federal Court.

[2] Obscenity is based on local values under *Miller v. California*, 413 U.S. 15 (1973). Operators, such as InterMedia will use a "highest" common denominator approach to avoid litigation.

Given the serious consequences of violating the Communications Act or state statute, cable operators will feel obligated to take significant precautions.

As an example of the consequences, many franchise agreements specify that a violation of the Communications Act, or any state or federal criminal statute, is a material violation of the franchise. If a PEG user violates an operator's policy of prohibiting obscene or indecent material, the *operator* may be liable for violating the Communications Act and may also be required to defend a federal or state criminal obscenity prosecution. Similarly, if a leased access channel lessee exhibits "indecent" programming in violation of the operator's policy banning such material, the operator could be liable for violating the Communications Act by failing to place the program on a blocked channel.

B. Intermedia's Policy Prohibiting Indecent Material on Leased Access Channels

Given the present statutory language of the 1992 Cable Act, InterMedia feels that it is necessary to ban all indecent programming material from its leased access channels. InterMedia outlines below the steps that it believes are necessary to insure that it complies with the difficult provisions of the 1992 Act. Commission approval of such policies and practices in its Report and Order and in final rules adopted in this proceeding, is vital to preserve cable service. Moreover, as discussed below, the FCC must preempt state and local regulations or actions that interfere and conflict with the purpose of this proceeding.

Effective December 4, 1992, InterMedia will require lessees to certify that they will not carry obscene or indecent programming. InterMedia will review, at the lessee's request, or in certain circumstances, on its own initiative, any program material which might conceivably be construed as obscene or indecent, and advise the lessee within 14 days whether it may cablecast the programming.[3] A determination by InterMedia that a particular

---

[3] InterMedia will request pre-screening if it has reasonable belief that the program is obscene or indecent.

program is obscene or indecent will be the final determination of the issue. If a lessee transmits any material on a leased access channel which InterMedia reasonably believes violates its policy, the lessee's access to the channel will be terminated immediately, and that lessee will be prohibited from acquiring any leased channel capacity from InterMedia in the future.

To effectively implement such policy, InterMedia will require most lessees of leased access channels to obtain insurance, similar to broadcaster's liability insurance, which will name InterMedia as a beneficiary.[4] Proceeds from the insurance policy would be used by InterMedia in the event of a lawsuit arising out of the transmission of obscene or indecent material.

In deciding to implement this policy, InterMedia considered several alternatives. InterMedia could require lessees to post a bond sufficient to cover the cost of possible fines and forfeitures, However, bonds are difficult to collect and do not provide for attorney's fees to defend potential lawsuits. InterMedia also considered and rejected as too severe a requirement that lessees provide an irrevocable letter of credit to cover anticipated costs of liability.

InterMedia recognizes the public policy goals behind promoting the use of leased access channels. There is a likelihood that implementing the programming policy outlined above will deter or even prevent the use of leased access channels by some individuals and companies. However, InterMedia presumes that Congress considered carefully the impact of Section 10, and weighed the competing public policies of promoting diversity of

---

[4] If a lessee cannot demonstrate sufficient balance sheet strength to support an indemnification, InterMedia will require the lessee to obtain broadcaster's liability insurance. It has been InterMedia's experience that many potential lessees are highly under-capitalized. Thus, insurance is necessary in lieu of a bare indemnity.

viewpoint with the concerns over children's access to obscene and indecent material on leased channels.[5]

C. Intermedia's Policy Prohibiting Certain Programming on PEG Channels

Similar to its policy with respect to leased access channels, InterMedia believes for the reasons stated above, that it is necessary to ban all "obscene" and "indecent" programming on its PEG channels in order to protect itself from potential liability for program material that it does not control.[6] 1992 Cable Act § 10(c). InterMedia will also prohibit material which it reasonably believes solicits or promotes unlawful conduct. Although the Commission indicated in the NPRM that it believes Congress intended "unlawful conduct" to refer only to prostitution. InterMedia will interpret and apply this restriction broadly to cover a greater range of possible criminal activities, until the FCC or the Courts limit the broad statutory language of Section 10(c).

At the request of any PEG user, InterMedia will review any program material (within 14 days) to determine whether such material complies with InterMedia's policy. In addition, InterMedia reserves the right to preview any material which it reasonably believes may violate its policy. InterMedia's determination as to whether a particular program complies with its policy will be the final determination.

InterMedia operates a cable system where the public access channel is programmed and controlled by an independent public

---

[5] Placing indecent programming on a special, scrambled leased channel is not a realistic alternative unless, of course, the program schedule of a commercial lessee contains repeated, indecent offerings. Scrambling a normally unscrambled channel requires a significant amount of time and labor in most systems operated by InterMedia.

[6] InterMedia agrees with the Commission's tentative conclusion that "sexually explicit conduct" was intended to refer to the same material defined as "indecent." Therefore, InterMedia will interpret "sexually explicit conduct" the same as it would interpret "indecent" material, unless the Commission's final rules indicate otherwise.

access corporation. InterMedia will require the corporation to obtain the same type of insurance policy as it will require for leased access channel lessees.[7] Such an insurance policy will name InterMedia as a beneficiary and its proceeds will be used by InterMedia to defend itself in any action arising out of the exhibition of obscene or indecent material on the public access channel.

All individual users, and where applicable, the access corporation, will be required to certify that no material that violates InterMedia's policy will be exhibited.[8] Moreover, each individual user and the access corporation, will be required to indemnify InterMedia for any liability arising out of the transmission of any obscene or indecent material. In the event that either the corporation or an individual user of InterMedia's PEG channels violates the policy, InterMedia will immediately, and permanently, terminate the violator's access to all InterMedia's PEG channels.

D. Censorship and Prior Restraint Concerns require Strong FCC Involvement

Notwithstanding the 1992 Cable Act, indecent material is constitutionally protected speech, and attempts to ban such material on cable television have been struck down in the courts. *Community Television of Utah v. Wilkinson*, 611 F. Supp. 1099 (D.C.Utah 1985). InterMedia is concerned that screening out potentially indecent programs, material containing "sexually explicit conduct," and "material soliciting or promoting unlawful conduct," could raise claims of unconstitutional prior restraint.[9]

---

[7] Because of potential liability, InterMedia can no longer delegate all authority over the channel to the corporation.

[8] See discussion at p. 14-16 infra regarding cable operators' limited liability where the access channel users certify they will comply with the cable operator's policies.

[9] "The schemes that have been invalidated by the Supreme Court as prior restraints on speech had this in common: they gave public officials the power to deny use of a forum in advance of actual expression." *Dial* (continued...)

A regulatory or statutory requirement that cable operators ban indecent programming is very likely to be unconstitutional.[10] While Senator Helms' discussion in the Congressional Record on the passage of S.12 argues that a "voluntary" prohibition of indecent material by cable operators is not a "state action" which triggers First Amendment concerns, that issue is clearly open.[11] However, until the courts address the issue, the FCC must assert exclusive jurisdiction over any prior restraint issues surrounding prohibited uses of leased and PEG access channels.

For example, InterMedia's policy prohibiting obscenity and indecency on leased access channels provides that: (1) the channel may not be used for the transmission of such programming; (2) if

---

[9](...continued)
Information Services v. Thornburgh, 938 F.2d 1535, 1543 (2nd Cir. 1991), *citing*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

[10] Apparently, Senator Helms conceded that unless the ban on obscene and indecent material is implemented voluntarily, it will *not* withstand constitutional scrutiny. *See* January 30, 1992 CONG. REC., p. S646. Moreover, in *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 695, n.4 (1979), the Supreme Court noted with approval that the Court of Appeals for the District of Columbia Circuit stayed the FCC's 1977 regulation which *required* cable operators to prohibit the transmission of obscene and indecent material on access channels. "The [Court of Appeals] disapproved the requirement on the belief that it imposed censorship obligations on cable operators." *Id.*

[11] January 30, 1992, CONG. REC., p. S646 - S649. Senator Helms cites *Dial Information Services*, *supra*, for the proposition that the Constitution permits cable operators to voluntarily ban indecent programming. However, the telephone companies in *Dial Information Services* did not *ban* the transmission of indecent messages. Rather, the dial-a-porn providers were required to notify the telephone company which messages were indecent so that the telephone company could activate the presubscription provision. Furthermore, it has yet to be adjudicated as to whether a "voluntary" ban imposed by cable operators, which this statute permits and in essence mandates, is a state action for purposes of Constitutional analysis.

the lessee violates InterMedia's policy, access to InterMedia's cable system will be immediately terminated; and (3) parties who violate InterMedia's policy will be barred from obtaining channel capacity in the future. Given InterMedia's concerns over questions of prior restraint, InterMedia urges the Commission to assert exclusive jurisdiction over disputes concerning permitted uses of leased access capacity. The same applies to PEG access channels — prohibiting the exhibition of certain questionable material could raise prior restraint issues by PEG users.

* * *

RESPECTFULLY SUBMITTED,

INTERMEDIA PARTNERS

By: /s/
Stephen R. Ross
Kathryn A. Hutton

ROSS & HARDIES
888 16th Street, N.W.
Washington, D.C. 20006

Dated: December 7, 1992

FCC Caption Omitted

COMMENTS OF MANHATTAN NEIGHBORHOOD NETWORK

Manhattan Neighborhood Network submits these comments in response to the above captioned proceeding. The Commission's Notice of Proposed Rule Making invited comments on the enactment of regulations that enable a cable operator to prohibit the use of any public, educational, or government access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

Manhattan Neighborhood Network is a non-profit organization responsible for administering the public access channels in the Borough of Manhattan. Manhattan Neighborhood Network assumed administrative responsibility for the pubic access channels in September 1992 after twenty years of administration by the local cable operators. Our experience in operating the public access channels in Manhattan provides us with unique expertise in this matter before the Commission.

1) The mission of Manhattan Neighborhood Network is to ensure the ability of Manhattan's residents to exercise their First Amendment rights through the medium of cable television. Manhattan Neighborhood Network encourages participation among the diverse racial, ethnic and geographic communities within the Borough and provides people with open non-discriminatory access to cable television for non commercial programming. We believe that our mission supports the intent of Congress in dedicating access channels as the video equivalent of the speaker's soapbox, fostering a diversity of viewpoints to viewers and furthering the goals of the First Amendment. The provisions under consideration by the Commission could seriously impair our ability to fulfill this mission.

2) Public access in New York has a history of providing a voice to people who would not otherwise have a means of public

expression. The complexities and conflicts of urban life are often explored on public access providing greater understanding among the people of Manhattan.

3) In Manhattan, as elsewhere around the country, the cable operator has no editorial control over the public access channels. Editorial control by the cable operator or any other entity managing public access endangers the principle of public access. Regulations "for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct" is disturbingly vague. We feel that this provision will threaten people's First Amendment rights and create a chilling effect on the use of public access by potential users in Manhattan.

4) To be sure, Manhattan Neighborhood Network does not support or endorse obscene programming or unlawful conduct. The question is what is the most effective means to deal with programming that may cross the line within the context of the First Amendment. To that end, we believe that local and federal law, along with appropriate judicial review, is the best means for dealing with obscenity and other unlawful conduct should they occur through public access or any other forum. If necessary, these laws can be effectively enforced against the program producer. We cannot imagine regulations censoring programming in advance that would not compromise public access and abridge speakers' rights under the Constitution.

5) There are currently two public access channels on each of Manhattan's two cable systems with two more channels on each system to be activated in early 1993. Demand for time on the public access channels constantly exceeds supply. Currently, the public access channels carry approximately 590 different programs per week totaling over 300 hours. With the addition of the new public access channels in 1993, we anticipate this number to increase by about fifty percent.

6) Public programs are generally produced by volunteers. People work with very limited resources contributing mainly their time and talent. Any regulations that would place increased burdens on producers would undoubtedly diminish the use of the public access channels.

7) It is our view that the access provisions under review are unconstitutional. However, if the Commission adopts rules to implement these provisions, the rules should be as specific and as narrowly defined as possible. Cable operators must not be permitted to curtail the legitimate public use of the access channels under a broad umbrella of program regulation.

8) The enforcement of program regulations will cause enormous practical difficulties preventing many programs from taking place at all. The people responsible for public access will be burdened by having to interpret and apply broad regulations to specific programs. The resulting cost for the necessary expertise to make these enforcement decisions will create an expense for both the cable operator and the public access producer. Such expense could be prohibitive to the public access producer thereby negating the producer's right to speak. Many speakers may never appear on public access for fear that they might be in violation of the regulations.

10) Several programs on Manhattan's public access channels are live and include interaction with the public via telephone. These programs are often forums for lively debate on local and national issues. We wonder how such programs could effectively be screened in advance to comply with program content regulations. Would such regulations pre-empt all such live programs therefore silencing many potential speakers within our community?

11) In 1993, we expect the volume of programs on Manhattan's public access channels to exceed 450 hours per week. Pre-screening to comply with cable operator rules would require about twelve dedicated full-time staff people, more than the entire staff currently employed by Manhattan Neighborhood Network. In addition to this added cost, enforcement of regulations would certainly delay programs dealing with timely issues thereby greatly reducing the effectiveness of those programs.

12) The Commission should make sure that the cost for any actions taken by the cable operator under this provision be undertaken at the operator's expense. Of course, the cable subscriber will ultimately bear the added cost.

13) We note with irony the Senate debate leading to the approval of the amendment necessitating the Commission's current deliberations on public access. According to a transcript of the U.S. Senate's debate on January 30, 1992, Senator Fowler referred to the use of public access channels to solicit prostitution through shams such as escort services, fantasy parties and live call-in shows. Senator Wirth elaborated by referring to the public access in New York City as "the most prurient and, in fact in many ways grossly illegal access one could imagine." We know of no program on Manhattan's public access channels that solicits prostitution through escort services, fantasy parties, live-call-in shows or any other means. In fact, commercial programming and advertisements of all types are expressly prohibited on public access by Manhattan Neighborhood Network policy statement.

14) We can not help but think that a serious error was made and that perhaps what Senator Wirth viewed on cable television in New York was the cable operator's "commercial use" or "leased access" channel. We note that Time Warner's "commercial use" or "leased access" channel regularly features advertisements for a variety of adult services. The manner in which the "commercial use" or "leased access" channel is operated in Manhattan should not lead to burdensome and unnecessary regulations imposed upon public access channels here and elsewhere across the country. Although Manhattan Neighborhood Network would not necessarily restrict non commercial programming of a sexual nature falling within the bounds of the First Amendment and applicable law, that type of programming is rare and infrequent. We urge the Commission not to jeopardize the integrity of public access as a First Amendment forum based upon erroneous perceptions or the fear that an isolated program may be potentially offensive to some viewers.

Respectfully Submitted,

/s/

Alexander Quinn,
President
Manhattan Neighborhood Network
110 East 23rd Street, 10th Floor
New York, NY 10010

Date: December 4, 1992

FCC Caption Omitted

COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES

The National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties (collectively, "the Local Governments") submit these comments in the above-captioned proceeding.

I. INTRODUCTION

The Federal Communications Commission ("FCC" or "Commission") seeks comment on implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"). Section 10 permits cable operators to prohibit indecent programming on the leased access channels on their systems, and eliminates cable operators' statutory exemption from liability for programming on access channels that involves obscene material. Section 10 also directs the FCC to promulgate regulations "designed to limit the access of children to indecent programming . . . which cable operators have not voluntarily prohibited," and to enable cable operators to prohibit the use of any public, educational, or governmental ("PEG") access channel "for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."

The Local Governments concur in the Commission's interpretation that the primary responsibility for identifying obscene material under Section 10 should be placed on programmers of leased and PEG access channels, rather than on cable operators. The programmer has the best knowledge of the content of the programs on access channels, and the cable operator should not be permitted — much less required — to censor programming on PEG

or leased channels. Accordingly, the Local Governments support the Commission's proposal which would allow cable operators to require programmers to identify obscene programming and to certify that all other programming does not contain obscene or indecent material.

The Local Governments submit, however, that the unique role of PEG channels in providing important programming in the public interest and encouraging the free flow of information among all segments of the community should be taken into account with respect to regulations governing responsibilities of providers of programming for PEG access channels. In particular, considerations of administrative ease and the prevalence of live programming on PEG access channels should support modification of the Commission's proposed rules concerning certification by PEG program providers.

II. DISCUSSION

A. PEG Access Channels

PEG access channels perform the vital function of ensuring that a diverse range of programming in the public interest from diverse sources is provided on cable systems. Many franchises regularly provide for one or more governmental channels which may be programmed by a government-related entity or government agency; educational channels, which may be programmed by one or more local institutions of higher learning or the local school system; and public access channels, which may be available for distribution of programming by the public on a first-come, first-served basis. Governmental channels carry such programming as local government meetings and deliberations, school board meetings, community events, citizen forums on current events, job bulletin boards, and information on availability of government services. Educational channels may provide primarily educational and informational programming, in many cases at no cost to the viewer. The public access channels are often managed by a public access organization, independent of the local franchising authority, that establishes and administers rules for the distribution of programming by the public. The unique nature and important function of PEG channels has been recognized by Congress:

> Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work.

H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 30 (1984).

Given the wide array of PEG programming and the potential administrative burdens of requiring programmers to provide, on a program-by-program basis, certification that certain programming does not contain obscene material — particularly when a substantial amount of the programming on PEG channels is live, the Local Governments urge the Commission to modify its proposed rules with respect to certification by PEG program providers in certain important respects.

First, the Local Governments urge the FCC to adopt regulations that would allow programmers to certify their programs on as broad a basis as the programmers deem appropriate. For example, a programmer could choose to provide a blanket, rather than program-by-program, certification that its programs do not contain obscene material. Such certification could be renewed annually, and would allow cable operators to place primary responsibility on programmers for ensuring that programs containing obscene material are not aired on the PEG access channels — without unduly burdening the administrative capabilities of those responsible for public interest programming.

Second, the Local Governments submit that some programming on PEG access channels, particularly live programming, is not amenable to prior certification as to its content. The Local Governments therefore urge the FCC to modify its regulations governing certification by PEG access providers. Such regulations would allow programmers of live formats to certify that they have exercised reasonable efforts to ensure that their programs will not

contain obscene or otherwise proscribed material. This "reasonable efforts" certification should apply generally to various PEG formats because of the unique nature of PEG access programming.

Finally, the FCC has suggested that disputes between cable operators and programmers of PEG access channels should be resolved by franchising authorities at the local level. The Local Governments believe that a better approach would be for such disputes to be resolved in the judicial system. Such disputes ultimately will be resolved in the judicial system; requiring franchising authorities to mediate such disputes merely will add an additional, inefficient step to resolution of disputes of the constitutional issues that inevitably will be decided by courts. This is especially true in connection with the PEG access channels, where the franchise authority may be the programmer, the editor or the facilitator.

B. Leased Access Channels

The Local Governments agree with the Commission's approach with respect to programming on leased access channels. Programmers, rather than cable operators, should bear the primary responsibility for identifying programs containing obscene material and for certifying that programs not so identified do not contain obscene material. The Local Governments furthermore support existing law providing that lock boxes shall be available to block access to cable services; nothing in the 1992 Act alters this existing law or mandates that lock boxes should be available only to block programming on the single leased access channel containing indecent programming. Many subscribers may wish to block programming on other channels. The 1984 Cable Act is quite specific in requiring the availability of lock boxes; this requirement should be enforced strictly. 47 U.S.C. § 544(d)(2)(A).

III. CONCLUSION

The Local Governments believe that the Commission's approach is sound with respect to implementing Section 10 of the 1992 Act. The Commission should take special care, however, to accommodate the unique public interest and administrative concerns of program providers for PEG access channels by allowing such

providers to make blanket, rather than program-by-program certifications, make only "reasonable effort" certifications with respect to live programming not amenable to prior certifications, and have disputes with cable operators resolved in the first instance by the judicial system.

Respectfully submitted,

/s/

Norman M. Sinel
Patrick J. Grant
Stephanie M. Phillipps
Preeta D. Bansal

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for the Local Governments

December 7, 1992

Cover Omitted

Table of Contents Omitted

FCC Caption Omitted

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

* * *

The problems caused by prohibiting operators from exercising editorial discretion over their channels are well known. In fact, the legislative history of the Act recognizes that the leased and PEG access requirements of the 1984 Cable Act have caused operators to allow programming on their systems that they and their subscribers may find objectionable.[4] But rather than eliminating entirely the access requirement in order to avoid these intrusions on editorial discretion, the Act imposes a different — and troublesome — remedy. It allows operators to deny access to *some* speech — but only to speech that the *government* defines as objectionable.

* * *

---

[4] *See* Statement of Senator Thurmond, 138 CONG. REC. S648 (daily ed. Jan. 30, 1992) ("It is truly disturbing that cable companies are forced to give [objectionable] programs a public forum and that cable subscribers must accept this porn as part of basic cable.")

Respectfully submitted,

NATIONAL CABLE TELEVISION ASSOCIATION, INC.

By _____/s/_____
Daniel L. Brenner

By _____/s/_____
Diane B. Burstein

ITS ATTORNEYS
1724 Massachusetts Ave., NW
Washington, DC 20036
(202) 775-3664

December 7, 1992

Cover Omitted

Table of Contents Omitted

Summary Omitted

FCC Caption Omitted

COMMENTS OF TELE-COMMUNICATIONS INC.

* * *

The courts have repeatedly recognized that, unlike broadcasting, cable permits consumers to exercise several levels of control over their program selection and viewing.[5] For example, cable subscribers must affirmatively elect to have cable service brought into their homes; cable subscribers can request a lockbox from the cable operator to block any channel; and, if cable subscribers are dissatisfied, they can cancel their subscription at any time. Similarly, cable programming is unlike telephony because it is not a necessity.

---

[5] See *Jones v. Wilkinson*, 800 F.2d 989, 991 (10th Cir. 1986), *affd.*, 480 U.S. 926 (1987); *Cruz v. Ferrel*, 755 F.2d 1415, 1419-22 (11th Cir. 1985).

Notwithstanding its strong view that leased and PEG access are unconstitutional, TCI offers the following comments because its systems will be directly and significantly burdened by Commission rules issued to implement Section 10.

In addition to the inherent constitutional problem, there is a fundamental internal inconsistency in the schemes for leased access and PEG access, particularly as amended by the 1992 Act. On the one hand, Congress prevents cable operators from exercising control over the content of leased and PEG access channels. 47 U.S.C. §§ 531(e) and 532(c)(2). On the other hand, Congress imposes on operators criminal, as well as civil liability for certain programming carried on those channels. 47 U.S.C. § 558

* * *

Positive traps are a form of interdiction that involves inserting a jamming carrier at the headend of a cable system between the video and audio carrier of a signal. This significantly degrades the picture quality and causes a repetitive beep in the audio. Subscribers need a device that is attached to the television set to descramble the signal.

Lockboxes are another form of interdiction. Since 1984, cable operators have been required to provide lockboxes to requesting subscribers. *See* 47 U.S.C. § 544(d)(2)(A). In the Notice (para. 9), the Commission inquires whether, in light of the 1992 Act, cable operators should still be required to provide lockboxes. There appears to be nothing in the Act that would eliminate that requirement. The Commission should also conclude that lockboxes are an option for blocking indecent leased access channels in satisfaction of the cable operator's obligation under 47 U.S.C. § 532(j)(1)(B). TCI is not aware of any significant problems with lockboxes. To the contrary, lockboxes give subscribers another method of controlling their program viewing, a clear goal of Section 10 of the Act. Thus, lockboxes, pursuant to the requirements of 47 U.S.C. § 544(d)(2)(A), should be an appropriate method of satisfying a cable operator's obligation to block indecent leased access channels.

* * *

Respectfully submitted,

TELE-COMMUNICATIONS, INC.

/s/
Michael H. Hammer
Philip L. Verveer
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20036-3384

Its Attorneys

December 7, 1992

Appendix Omitted

Cover Redacted

COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

Table of Contents Omitted

SUMMARY

Time Warner Entertainment Company, L.P. ("TWE") has taken the position that being compelled to carry leased access (commercial use) and public, educational and governmental ("PEG") programming is a violation of TWE's rights as a First Amendment speaker. *See Time Warner Entertainment Company, L.P. v. FCC*, Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992). Yet, because TWE and its divisions will be affected by any rules issued by the Commission concerning these types of programming, it offers the following comments.

To accomplish Congress' goals, TWE believes the Commission should promulgate rules that:

- provide for channel blocking procedures that reflect the technological and programming realities of the cable industry;
- permit cable operators to require certification, notice and indemnity regarding indecent material from commercial use program providers;
- recognize that many PEG channels are not administered by cable systems, but instead are administered by an agency of the local government or by a community access organization;

- permit cable operators and community access organizations to require certification and indemnity from PEG program providers;
- establish a procedure whereby disputes regarding prohibited PEG programming are resolved; and
- adopt a definition of "indecent" and "sexually explicit" material that incorporates a community standard "for the cable medium" as measured by the "average cable user" on a nationwide basis and judges material within the whole program and the merit of the work.

TWE believes the recommendations set forth above fully comport with Congressional policy and would best serve the public interest.

FCC Caption Omitted

COMMENTS OF TIME WARNER
ENTERTAINMENT COMPANY, L.P.

Time Warner Entertainment Company, L.P. ("TWE") respectfully submits the following comments regarding the Notice of Proposed Rule Making ("NPRM"), released November 10, 1992 and relating to the implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").

Introduction

TWE is a partnership, which is primarily owned (through subsidiaries) and fully managed by Time Warner Inc., a publicly traded Delaware corporation. TWE is comprised principally of three unincorporated divisions: Time Warner Cable ("TWC"), which operates cable television systems; Home Box Office, which operates pay television programming services; and Warner Bros., which is a major producer of theatrical motion pictures and television programs.

TWC, which is the TWE division most affected by Section 10 of the 1992 Cable Act, owns and operates cable systems in approximately 1,000 franchise areas throughout the United States. As required by the Cable Communications Policy Act of 1984 (the "1984 Cable Act") and many local franchises, these systems carry both leased access and public, educational and governmental ("PEG") access channels. Because of this, TWC and its divisions are directly impacted by the Commission's proposed rules relating to indecent programming and other types of material on cable access channels.

One striking example of a TWC cable operator that will be immediately and directly affected by the Commission's rules is Time Warner Cable of New York City ("TWCNY"), which serves, among other parts of that City, over 250,000 subscribers in the southern portion of Manhattan. TWCNY's Manhattan system has over 70 channels and offers more than 10 leased access and 5 PEG channels.[1] On both its leased access and PEG channels TWCNY is required under the 1984 Cable Act to carry programming that may at times be indecent, which it otherwise would not choose to provide. Indeed, on leased access Channel 35 TWCNY has at least five hours daily of "adult" programming from at least 9 producers offering sexually explicit programming. Most of the adult programmers offer one or more programs on a daily or weekly basis on time they lease by agreement from TWCNY in periods from 13 to 78 weeks.

For example, TWCNY in required to carry on Channel 35 in Manhattan a series entitled "Midnight Blue" twice a week from midnight to 1:00 a.m. Portions of "Midnight Blue" include excerpts from sexually explicit video cassettes and films showing in graphic detail intercourse, masturbation and other sex acts. The commercials shown on "Midnight Blue" advertise sex-oriented products and services, such as "escort services", "dial-a-porn" telephone lines and Screw Magazine ("Midnight Blue"'s print counterpart). On Channel 35, each day from 10:00 p.m. to 4:30 a.m. is usually fully booked with sexually explicit programming and

---

[1] In 1993, TWCNY is committed to provide 9 PEG channels.

the demand for additional time remains high. Most of these programs are provided on videotape and require the system to handle and process dozens of video cassettes every week.

In addition, various other TWC cable systems carry programming that is considered by some viewers in their localities to be indecent. For example, TWC's system in Austin, Texas was provided programming by a public access programmer that combined nude scenes from a movie, photographs of aborted fetuses, and a man shooting himself in the head. TWC's cable system in Indianapolis, Indiana has carried on its public access channel "safe sex" programming, which includes sexually graphic descriptions. And, TWC's cable system in Cincinnati, Ohio has carried on its public access channel nude sports programming supplied by a nudist organization.

In its pending action against the Commission, *Time Warner Entertainment Company, L.P. v. FCC*, Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992), TWE takes the position that the leased access and PEG channel requirements (Sections 611 and 612 of the 1984 Cable Act (47 U.S.C. §§ 531, 532) and Section 7(b)(4)(B) of the 1992 Cable Act), as well as the must carry channel requirements (Sections 4 and 5 of the 1992 Cable Act) unconstitutionally compel it to speak in a manner that it would not otherwise choose. This is a violation of TWE's rights as a First Amendment speaker. In addition, TWE challenges the leased access, PEG and must carry requirements because they seize, without adequate compensation, substantial portions of its facilities (an average of roughly more than 30% of TWC's systems' channel capacity) and transfer control of that capacity to other speakers. This is a violation of the Takings Clause of the Fifth Amendment. In submitting these Comments, TWE specifically reserves, and does not waive, its constitutional rights, and these Comments are filed without prejudice to TWE's constitutional challenges.

Notwithstanding TWE's position on being forced to carry leased access and PEG programming, but recognizing that the Commission must act pursuant to the obligations imposed by the 1992 Cable Act, since TWE and its divisions will be further burdened directly by any rules issued by the Commission, it offers the following

comments regarding the proposed rules for carriage of material that is indecent on leased access channels and material that is obscene, indecent or solicits or promotes unlawful conduct on PEG channels.

I. Proposed Rules Regarding Indecent Programming on Leased Access Channels.

Section 10(b) of the 1992 Cable Act directs the Commission, within six months from October 5, 1992, to promulgate regulations limiting the access to indecent programming on leased access channels, to the extent that cable operators have not voluntarily done so pursuant to Section 10(a), by (i) placing all indecent programming on a separate channel, (ii) blocking the channel unless the subscriber requests access thereto in writing, and (iii) requiring programmers to inform cable operators in advance if the programming they are providing is indecent.

A. The Definition of "Indecent"[2]

Section 10(b) of the 1992 Cable Act does not define "indecent". The Commission is proposing to adopt the definitional language of Section 10(a) as the definition of indecent. The definition should, as proposed, incorporate a community standard "for the cable medium". Additionally, the rule should make clear that the standard is that of the "average cable viewer" on a nationwide basis, much as the Commission has done in the broadcast area.[3]

---

[2] Although TWE discusses below the proper definition of "indecent," nothing herein concedes that it is constitutionally permissible for the government to prohibit or restrict the carriage of indecent programming on cable television.

[3] *See In re Infinity Broadcasting Corp.*, 3 F.C.C. Rcd. 930, 933 (1987), *remanded on other grounds sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("[T]he purpose of 'contemporary community standards' [is] to ensure that material is judged neither on the basis of a decisionmaker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group. . . . Hence, in a Commission proceeding for indecency, in which the Commission applies a concept of 'contemporary community standards for the broadcast

(continued...)

Moreover, the rule should also include an indication that in judging whether the material is patently offensive, it must be judged within the context of the whole program and the merit of the work. The Commission has recognized this approach in the broadcast area.[4] Any reluctance to give the merit of the work significant weight in the determination of indecency in the broadcast area should not impede such an approach in the cable medium.

---

[3](...continued)
medium,' indecency will be judged by the standard of an average broadcast viewer or listener.") (footnotes omitted)

[4] *See Infinity*, 3 F.C.C. Rcd. at 932:

> "16. As we stated in our April rulings, and as we re-emphasize today, the question of whether material is patently offensive requires careful consideration of context. The Supreme Court has said that the term 'context' encompasses a 'host of variables'. These variables, whose interplay will vary depending on the facts presented, include, as the Court noted, an examination of the actual words or depictions in context to see if they are, for example, 'vulgar' or 'shocking,' a review of the manner in which the language or depictions are portrayed, an analysis of whether allegedly offensive material is isolated or fleeting, a consideration of the ability of the medium of expression to separate adults from children, and a determination of the presence of children in the audience.
>
> "17. The merit of a work is also one of the many variables that make up a work's 'context,' as the Court implicitly recognized in *Pacifica* when it contrasted the Carlin monologue to Elizabethan comedies and works of Chaucer. But merit is simply one of many variables, and it would give this particular variable undue importance if we were to single it out for greater weight or attention than we give other variables. We decline to do so in deciding the three cases before us. We must, therefore, reject an approach that would hold that if a work has merit, it is *per se* not indecent. At the same time, we must reject the notion that a work's 'context' can be reviewed in a manner that artificially excludes merit from the host of variables that ordinarily comprise context." (footnotes omitted)

There are good reasons to adopt for cable television a definition of "indecent" more narrow than those developed by the Commission for application to broadcast programming and telephonic communications. Cable television is not freely available like broadcast television or radio, viewers have affirmatively to subscribe to get it and cable television lends itself well to opt-out mechanisms such as lock box devices and signal scrambling.[5]

Therefore, TWE respectfully submits that subpart(a) of the proposed rule read:

> "(a) A cable operator may enforce prospectively a written and published policy of prohibiting on leased access channels programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs, in a patently offensive manner, as measured by contemporary community standards for the cable medium, and when judged in the context of the entire program, including the program's overall merit."

B. Blocking of Indecent Programming

Section 10(b) requires cable operators to place on a "single channel" all indecent commercial use programming and then to block that channel. Congress' clear intention in passing this provision was to limit children's access to indecent programming, and not necessarily to limit the amount of indecent programming that a cable system could carry to that which may fit on one channel. The Commission, therefore, should make clear that cable operators may, if they choose, place indecent commercial use

---

[5] There are authorities rejecting as unconstitutional on grounds such as those stated in the text the extension to cable television of overbroad definitions of indecent programming. *See, e.g., Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *see also Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1453-54 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Cox Cable Communications, Inc. v. United States*, 774 F. Supp. 633, 636-37 (M.D. Ga. 1991) (tending to extend to cable television the robust First Amendment protection accorded to the print media).

programming on more than one channel as long as any channel that in designated for indecent programming is blocked.

To block a channel designated for indecent programming requires certain technical adjustments that will vary from system to system depending on a system's technological development. Because of the differences in system technologies that exist, the choice of the mechanism to accomplish blocking should be left to the cable operator. In addition, because the blocking will generate potentially burdensome technical and administrative expenses, cable operators should be allowed to recoup these expenses from either subscribers or program providers.

Even in systems that are fully addressable, and which can thereby block channels by the relatively straight-forward approach of scrambling the signal, it will take time to make the necessary technical adjustments and to permit the operator to notify subscribers if it wishes. Moreover, certain local authorities require advance notice before an operator can make certain changes to its service or programming.[6] Operators will need sufficient lead time to put in place the blocked channel. Therefore, TWE proposes that operators with addressable systems have at least 180 days from the effective date of the rule to comply.

As recognized by the Commission, to date the problem of blocking programming not desired by the subscribers has been addressed by supplying a locking device to subscribers, pursuant to Section 624(d)(2)(A) of the 1984 Cable Act (47 U.S.C. § 544(d)(2)(A)). There has been no showing that these locking devices have been ineffective in keeping indecent programming from children. With this mechanism available, and to accommodate the technological problems, the rule should permit systems that are

---

[6] *See, e.g.*, New York Executive Law § 824-a(1) (1992) ("Every cable television company shall notify the [state] commission of any network change or significant programming change no later than the later occurring of forty-five days prior to the network change or significant programming change or five business days after the cable television company first knows of such change.").

not fully addressable to be in compliance within 10 years from the effective date of the rule.[7]

Additionally, in certain areas channel capacity constraints may result in indecent programming being cablecast on the same channel as non-indecent programming. On other systems where there is little indecent programming, the operator may prefer not to devote an entire channel to such programming to avoid leaving large blocks of fallow time on the channel. Therefore, the rule should make clear that the channel need be blocked only during the times indecent programming is being carried. If operators cannot have this leeway, producers of non-indecent programming may well have difficulties selling advertising since such programming will be viewed only by those interested enough to request access to the channel. Moreover, certain providers of non-indecent programming may not want time adjacent or near to indecent programming. These circumstances make it important that the system operator also be able to limit the time periods during which indecent programming may be cablecast, so as not to interfere with non-indecent programming and to minimize the blocking and unblocking of the signal during the day. Such restrictions are consistent with the power granted to the operator by Section 10(a) to bar *all* indecent programming if it so chooses.

Similarly, in certain systems, such as TWCNY's Manhattan system, more than one programmer may request a particular time slot and want to cablecast indecent programming in that slot. If the operator has provided only a single blocked channel for indecent programming,[8] the rules should permit the operator to choose one programmer over the other for cablecast on that single channel without facing the possibility of having to defend against an action for denial of access under Section 612(d) or (e)(1) of the 1984

---

[7] This is similar to the 10-year delayed compliance date with the buy through prohibitions in § 3(b)(8)(B) of the 1992 Cable Act.

[8] Since, as noted above, an operator may bar all indecent programming, it surely may not be required to offer additional channels for indecent leased access programming above what it has voluntarily chosen to provide.

Cable Act (47 U.S.C. § 532(d) or (e)(1)), or for denial of access or imposing unreasonable terms and conditions of carriage by relegating one producer to an allegedly less desirable time slot on the channel.[9]

---

[9] Subsections (d) and (e)(1) of § 612 provide as follows:

"(d) Any person aggrieved by the failure or refusal of a cable operator to make channel capacity available for use pursuant to this section may bring an action in the district court of the United States for the judicial district in which the cable system is located to compel that such capacity be made available. If the court finds that the channel capacity sought by such person has not been made available in accordance with this section, or finds that the price, terms, or conditions established by the cable operator are unreasonable, the court may order such system to make available to such person the channel capacity sought, and further determine the appropriate price, terms, or conditions for such use consistent with subsection (c), and may award actual damages if it deems such relief appropriate. In any such action, the court shall not consider any price, term or condition established between an operator and an affiliate for comparable services.

"(e)(1) Any person aggrieved by the failure or refusal of a cable operator to make channel capacity available pursuant to this section may petition the Commission for relief under this subsection upon a showing of prior adjudicated violations of this section. Records of previous adjudications resulting in a court determination that the operator has violated this section shall be considered as sufficient for the showing necessary under this subsection. If the Commission finds that the channel capacity sought by such person has not been made available in accordance with this section, or that the price, terms, or conditions established by such system are unreasonable under subsection (c), the Commission shall, by rule or order, require such operator to make available such channel capacity under price, terms, and conditions consistent with subsection (c)."

Therefore, TWE respectfully suggests that subpart (b) of the proposed rule read as follows:

" (b) All programs intended for carriage on channels designated for commercial leased access use under this section and identified by the program provider as indecent shall be placed on one or more channels designated by the cable operator for indecent programming, except for such programs prohibited by the cable operator pursuant to paragraph (a) above. A cable operator shall block any such channel at least during the times when indecent programming is being carried except for subscribers requesting access to such channel in writing. The cable operator may group time slots to be made available for indecent programming in order to facilitate the administration and the sale of time on these channels without such action constituting the exercise of editorial control subject to 47 U.S.C. § 532(c)(2).

(1) For cable systems that are fully addressable, this paragraph (b) is effective 10 days after publication in the Federal Register.

(2) For cable systems that are not fully addressable, this paragraph (b) shall not apply until the earlier of:

(A)the time at which the cable system is fully addressable; or

(B) 10 years after the effective date of this rule.

(3) In those circumstances where the time requested by the program provider is already under contract, the cable operator shall offer the program provider time available on the channel as close as possible to the time requested. If no other time is available, the cable operator is entitled to refuse to carry the programming on its system until capacity is available for indecent programming, upon further application by the program provider.

(4) In those circumstances where two or more program providers request the same time period on a channel designated for indecent programming, the cable operator can select which

program provider will program that time period without such action constituting the exercise of editorial control subject to 47 U.S.C. § 532(c)(2)."

C. Program Provider Must Give Notice By Certification

Section 10(b) of the 1992 Act requires that program providers notify the cable operator regarding indecent programming they intend to offer in order to trigger the operator's obligations to restrict access to such programming. It is essential, to protect the cable operator from undeserved liability, that the rules require that this notice be clearly set forth in writing and timely and that the cable operator be able to rely on it. In cable systems such as TWCNY's Manhattan system as an example, to date most indecent programming has been contained in series programming where the program provider contracts for time (in ½-hour, hour or larger blocks of time on one or more specific days each week) for periods of from 13 weeks to as long as 18 months.[10] Once the time has been contracted for, the program usually is cablecast on a specific channel for the duration of the contract. Programmers should not be permitted to change their minds during the contract period and give notice of intention to submit indecent programming thereby requiring a possible change in channel placement of their programming. Although in Manhattan most contracts permit the system to relocate the program, such moves are disruptive for subscribers and costly to the operator, and while sometimes necessary, are usually avoided. Therefore, if a series program provider is able to insert and give notice of indecent programming within the series term whenever it desires, and the series is not already on the blocked channel, there could be serious administrative, scheduling and expense burdens on the operator.

To address these issues, the rule should permit the operator to require each leased access program provider to give the statutory

---

[10] While these programmers lease time at a specified price, as the legislative history makes clear, the form of transaction for purchasing the time is not limited to a lease, but can include "fees per subscriber, profit sharing or any combination of these arrangements". 130 Cong. Rec. H12239 (daily ed. Oct. 11, 1984) (statement of Rep. Wirth).

notice at the time it contracts for time on the system in the form of a certification that the program provider will not include obscene material and either plans to include indecent material or will not include indecent material in its programming for the duration of the contract period.[11]

As part of the Commission's rules it should be made clear that the operator's insistence upon the certification cannot form the basis for an action by the programmer under Section 612(d) or (e). Moreover, once a blocked channel is filled, the operator should be able to require this certification to avoid any administrative problems should an indecent program be submitted and cablecast by a program provider not on a blocked channel. As it is, operators, having been deprived of their immunity from liability for obscene programming on leased access and PEG channels while being forced to put on programming they would not choose in the first place, are already dealing with an intolerable burden.

Additionally, the proposed rule requires the statutory notice be given "no later than seven days prior to the requested carriage". This time minimum of advance notice is relevant primarily for programmers obtaining only a one-time slot on the blocked channel since series programmers will have given notice in their on-going contracts. Since in certain systems accommodating indecent programming may require changes in schedules, sufficient flexibility in the notice period should be given to permit these changes to be accommodated within the normal scheduling time frame and to be reflected in any guides offered by the system to subscribers that list the programming at issue. Some cable guides present schedules for a week's worth of programming, which are typically prepared two weeks in advance and some present schedules for a month's worth of programming, some of which must be prepared two months in advance.[12] Because individual

---

[11] This is true if the programmer contracts only for a one-time slot or contracts for a series of time slots.

[12] For example, TWCNY's pay-per-view programming line-up must be prepared two months in advance. In practice, this means, for example, that the November line-up must begin production on September 1.

cable systems will need different lengths of prior notice, the rule should make clear that cable operators are allowed to require that notice (in the form of the required certification) be given a reasonable amount of time prior to the requested carriage, depending on their individual needs.

The notice should be required to be in writing to avoid later confusion or unnecessary disputes. Retention of these notices should be for a period of 18 months which is consistent with other similar record retention requirements in the cable area.[13]

The Commission also has asked whether the operator should be held harmless from liability if it does not receive timely notice from the program provider. Since the cable operator is already immune from civil and criminal liability for indecent programming cablecast on leased access channels (47 U.S.C. § 558), TWE assumes this concern relates to possible sanctions by the Commission for a violation of this new rule.

The operator should be held harmless in those circumstances because without such assurance, cable operators might feel compelled to prescreen all or portions of leased access programming to try to insure that no indecent programming is included — a task that is expensive, far from easy and has proven troublesome even for justices of the Supreme Court. The burden and expense of such prescreening outweighs whatever additional comfort that might give to the Commission that indecent programming would not inadvertently be made available. Indeed, leased access programming may be delivered live or by satellite feed instead of by presubmitted videocassette making notice even more critical. Moreover, failure to provide this immunity would be inconsistent with the objective of the statute to place the burden in this area squarely on the program provider.

Finally, the Commission should specifically authorize the cable operators to require indemnity from program providers for breach of their notice or certification obligations. If program providers

---

[13] *See* 47 C.F.R. § 76.225(c) (1991) (Commercial Limits in Children's Programs); 47 U.S.C. § 503(b)(6)(B).

breach their certifications, cable operators, through no fault of their own, could suffer both liability and legal expense. Accordingly, that expense should be placed on the party at fault — the program provider that breached its representations.

TWE respectfully proposes that subpart (c) be modified and supplemented as follows:

> "(c) Cable operators are authorized to require program providers on leased access channels that lease or otherwise contract for time to certify to cable operators, a reasonable time prior to cablecast determined by the cable operators, that they plan to include indecent material as defined in paragraph (a) above in their programming or that they will not include any indecent material as defined in paragraph (a) above in their programming for the duration of the lease or contract period. Cable operators are also authorized to require program providers to certify in their contracts that they will not include obscene material in their programming. Such certification can be required to be in the contract for time or in some other available manner, at the cable operators' discretion. Cable operators are also authorized to require program providers to indemnify cable operators completely for any liability or expense the cable operators may incur in relation to the programming submitted for cablecast.
>
> "(d) The failure to limit indecent programming to a blocked channel as required by this rule shall not subject the cable operator to sanction by the Commission unless it is demonstrated that the operator had received the required written notice from the program provider in a timely fashion."

II. Proposed Rules Regarding Public, Educational and Governmental Access Channels.

Section 10(c) of the 1992 Cable Act directs the Commission to promulgate regulations that enable cable operators to prohibit on PEG channels programming that "contains obscene material, sexually explicit conduct, or material soliciting or promoting

unlawful conduct". As was stated in the NPRM, Section 10(c) does not require cable operators to prohibit such programming, it simply makes clear that cable operators have the right to do so if they choose.

The proposed rule, however, needs certain clarifications. *First*, the rule fails to recognize that many PEG channels are not administered by cable systems, but instead are administered by an agency of the local government or a community access organization. For example, in Erie, Pennsylvania, a Public Access Authority, established by the City Council pursuant to State legislation, completely administers public access channels; in Indianapolis, Indiana, a Citizens Advisory Committee, established by franchise, consults regarding appropriate programming on PEG channels; and in Austin, Texas, Austin Community Television Inc. completely administers three public access channels.[14] The proposed rule, therefore, should be amended in its reference to "[a] cable operator" to refer instead to "[a] cable operator or organization, designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system".

Second, the NPRM recognizes (p. 6 n.11) the congressional intent that "sexually explicit" as used in Section 10(c) should be interpreted to mean "indecent" as used with respect to the leased access restrictions. The proposed rule, however, uses the "sexually explicit" term. Not all sexually explicit programming is indecent. To avoid any confusion, TWE proposes that the rule use "indecent" as defined in the leased access rules instead of the term "sexually explicit".[15]

---

[14] In addition to these three public access channels, Austin also has one educational channel administered by a local community college, two educational channels administered by a local school district, one governmental channel administered by the county and one governmental channel administered by the City of Austin.

[15] The use of terminology in this area is difficult and important and one's ability to understand it is not made easier by the language of the Cable

(continued...)

Third, the rule should reflect, as the NPRM recognizes, that a cable operator or local access organization may enforce its policy of prohibiting the defined programming by requiring certification by PEG users, in their contracts for PEG access or otherwise, that their programming does not fit into any of the rule's three defined categories. This approach promotes Congress' intent. Just prior to Section 10(c)'s passage, Senator Wirth, the original author of the PEG provisions, stated that through Section 10(c) Congress would "give a very clear signal to the cable companies that, in fact, they can police their own systems". 138 Cong. Rec. S 650 (daily ed Jan. 30, 1992).

Such certification is also justified as a means for cable operators to balance their power under the rule on the one hand, and the 1984 Cable Act's prohibition on cable operators exercising "any editorial control over any public, educational, or governmental use of channel capacity" on the other hand. *See* Section 611(e) (47 U.S.C. § 531(e)). By requiring a certification from PEG programmers, Congress' purpose is served with less intrusion by the cable operator. Ancillary to permitting such certification, the Commission should make clear that cable operators and local access organizations can require indemnity from program providers (including governments and local access organizations acting as program providers) for breach of the certification. Cable operators need this specification in the rule to indicate that such indemnity provisions do not constitute the exercise of editorial control.[16]

---

[15](...continued)
Act. For example, note 3 of the NPRM states that Section 15 "relates to the provision of unsolicited sexually explicit programs on 'premium channels'". However, the statute's text only refers to programming that has been rated R, NC-17 or X by the Motion Picture Association of America, and the R rating is not equivalent to "sexually explicit" or "indecent" material. An R rating may be bestowed on a film for "hard language, or tough violence, or nudity within sensual scenes, or drug abuse". Jack Valenti, The Voluntary Movie Rating System 9 (1991).

[16] In actions brought by the producers of adult programs on a leased access channel against TWCNY, the plaintiffs claim that representations

(continued...)

Local access organizations as well may need such indemnification since they may not have immunity for actions they take regarding the channels they administer.[17]

Fourth, the NPRM recognizes that procedures need to be developed to govern disputes between the cable operators and PEG programmers and indicates the Commission's inclination to leave those disputes to be handled at the local level. While TWE agrees with that approach, it suggests that certain limits be put on such local power. As discussed above with respect to leased access, cable operators must be able to rely on the certification of the program providers. However, in some instances, an operator may in good faith come to the conclusion that the certification is inaccurate. Accordingly, when a programmer certifies that its programming does not contain any of the defined material, yet the cable operator finds that it does, the cable operator's finding should have a presumption of validity. Moreover, programming which the cable operator determines should be prohibited from cablecast under the rule need not be cablecast until the programmer challenges the cable operator's decision and successfully proves that it does not fall within a prohibited category. Finally, cable operators should be given the right to obtain an assurance from the local franchise authority that if the operators reasonably and in good faith determine that PEG programming falls within a prohibited category, they will not be held liable by the local franchise authority for

---

[16](...continued)
and warranties clauses and indemnification clauses in contracts are unreasonable in part because they constitute the exercise of editorial control by the operator. *Media Ranch, Inc. v. Manhattan Cable Television, Inc.*, No. 90 Civ. 7218 (S.D.N.Y. filed Nov. 9, 1990); *Gay Cable Network, Inc. v. Manhattan Cable Television, Inc.*, No. 91 Civ. 7450 (S.D.N.Y. filed Nov. 1, 1991).

[17] Furthermore, the Commission should make clear that cable operators can require indemnity from a local access organization or franchise authority that requires cable operators to carry programming from which they may incur liability.

breaching an obligation under their franchises to provide PEG programming.

TWE respectfully submits that the proposed rules regarding PEG programming should read as follows:

> "(e) A cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system may prohibit the use of any channel capacity on such facilities for any programming that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct."

> "(f) A cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system are authorized to require that public, educational or governmental program providers (including governments or access organizations acting as program providers) (1) certify, by contract or otherwise, that they will not submit programming that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct, and (2) agree that they will indemnify the cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system for any liability or expense they may incur in relation to the programming."

> "(g) In any dispute brought under paragraphs (e) or (f), there shall be a presumption that the findings of the cable operator regarding programming that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct are reasonable and in good faith unless shown by clear and convincing evidence to the contrary. Any programming that the cable operator, or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system, determines to contain obscene material, indecent material as defined in paragraph (a) above,

or material soliciting or promoting unlawful conduct shall not be cablecast until the program provider challenges that determination and there is a final decision by a competent authority that the programming does not fall within one of the prohibited categories set out in paragraph (f)."

"(h) Cable operators are authorized to require local governments or access organizations to indemnify them completely for any liability or expense the cable operators incur as a result of indecent programming being carried on their systems which the local governments or access organizations control."

"(i) A cable operator is authorized to require a franchising authority to provide its assurance that it will not hold the cable operator liable for breaching an obligation under its franchise to provide public, educational and governmental programming if the cable operator in good faith withholds programming because it finds it to be within one of the prohibited categories set out in paragraph (f)."

III. Obscene Programming on Leased Access and PEG Channels.

Congress in amending Section 612(h) of the 1984 Cable Act appears to provide coextensive power in both the cable operator and the local franchise authority to prohibit programming that is "obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy or indecent or is otherwise unprotected by the Constitution of the United States". Section 612(h), as amended, is inartfully drafted and creates the possibility of situations where the local franchise authority determines that certain programming violates Section 612(h) while the cable operator does not believe that the programming violates Section 612(h). If in fact the franchise authority can order the cable operator not to cablecast such programming, then the cable operator faces possible action against it by the program provider pursuant to 47 U.S.C. Section 532(d) or (e)(1). Therefore, the Commission should authorize the cable operator to require an indemnification from the local franchise authority concerning any liability or expense incurred by the

operator because of the action by the franchise authority prohibiting programming from the leased access channels.

With particular reference to "obscene" programming, Congress has opened up cable operators to liability for cablecasting such programming. *See* 1992 Cable Act § 10(d). This liability, however, places a very high price on the difficult and complicated decision that cable operators must make regarding the ever-troubling question of what is obscene. If a cable operator labors over whether certain material is obscene and in the end decides that it is not, that cable operator, even though it in good faith allowed the material to be cablecast, is nevertheless subject to possible criminal and civil liability regarding programming it did not voluntarily choose to cablecast in the first place. In order to alleviate the unfair exposure that the cable operator now faces if it cablecasts a leased or PEG program that is later determined to be obscene, the Commission should provide the cable operator immunity from state and local law for the cablecast of any obscene programming on leased access or PEG channels.

TWE respectfully submits that the proposed rules be supplemented with the following:

"(j) Cable operators are authorized to require local franchise authorities to indemnify them completely for any liability or expense the cable operators incur as a result of the franchise authorities prohibiting the cable operators from cablecasting programming pursuant to 47 U.S.C. § 532(h)."

"(k) Cable operators shall not incur any liability under state or local law for any program that involves obscene material which is carried on any channel designated for public, educational, or governmental use or on any other channel obtained under 47 U.S.C. § 532 or under similar arrangements."

Conclusion

With the understanding that TWE has taken a position against its cable systems being forced to carry leased access and PEG programming, TWE has appended hereto recommended rules to implement Section 10 of the 1992 Cable Act and respectfully submits them for the Commission's adoption.

Respectfully submitted,

TIME WARNER ENTERTAINMENT
COMPANY, L.P.

/s/
Stuart W. Gold

Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000
Its Attorneys.

December 7, 1992

Virginia B. Bogue Letterhead

December 4, 1992

VIA FEDERAL EXPRESS

Alfred C. Sikes - Chairman
Federal Communications Commission
1919 M. Street, N.W.
Washington, D.C. 30554

Re: Public Access Programming

Dear Chairman Sikes:

I am writing to you because I have recently become aware of and alarmed about sexually explicit adult programming cable cast on my public access cable channel. I live in Tampa, Florida and I am an attorney as well as a wife and mother. My public access channel is channel 12, situated between ABC on Channel 10 and CBS on Channel 13. While switching channels one evening, I saw scenes that I couldn't believe were on at all, but especially during prime time. Totally nude women were pole dancing and lap dancing, squatting and gyrating so that their genitals were in full view. I have since seen a tape of a totally naked man dancing and screaming obscenities and have become aware that such programming is even shown on Saturday mornings. I am concerned about the negative effect of such programming on our children.

David Elkind, Professor of Child Development at Tufts University, has this to say about the effect of nudity on television on our children:

> "In what I call the postmodern family," he says, "we have this new image of the child as competent and sophisticated. Adults have this perception that children can handle all this stuff. . . But I disagree. I think children find it most

disturbing, hurtful and damaging. Any they wonder, Why am I being allowed to see this? Why isn't anyone saying, Kids don't need to see this stuff. Why isn't anyone looking out for my interest?" *Newsweek*, November 2, 1992.

A friend, Amy Lerom and I have spoken with Tampa Mayor Sandra Freedman, the Chairman of the City Council Joe Greco, made a presentation to our Local Cable Advisory Committee and the Hillsborough County Commission. Everyone says there is little they can do to limit or regulate this adult programming. Tapes have been presented to the State Attorney's Office and were not considered criminally obscene. As an attorney, I understand that this material, unless adjudged obscene by a court of law, is protected by the First Amendment. Therefore, Mrs. Lerom and I are presenting three proposals that we feel are the least restrictive ways to achieve a balance between the interest of our children and the interest of free speech.

We are not asking that sexually explicit/indecent material be banned or that its contents be changed or censored in any way. We are asking that it be made available at a time and in a manner so that it is accessible to adults but not children. These recommendations are set forth in the enclosed Comments to Proposed Rule Making.

We, as parents, need this commission to help us protect our children by adding these three *logical* and *simple* recommendations to the existing FCC Regulations.

I urge the FCC to promulgate rules regulating adult programming on public access cable channels.

Sincerely,

By:_____/s/_____
Virginia B. Bogue

By:_____/s/_____
Amy Lerom

FCC Caption Omitted

COMMENTS TO PROPOSED RULE MAKING

We are concerned about children being exposed to sexually explicit/indecent programming on PEG channels.

Section 10 of the Cable Act of 1992 allows the cable operator the option of prohibiting sexually explicit/indecent programming on Public, Educational and Governmental Access Channels. However, if the cable operator opts to allow or continue sexually explicit/indecent programming, there are *no* provisions provided to regulate the time or manner in which sexually explicit programming is presented. Cable operators are liable only for programming which reaches the level of obscenity.

Therefore, we urge the Commission to adopt the following rules to regulate sexually explicit/indecent programming on cable PEG channels:

1. Move the public access channel to channel 50 or above so that it is less likely for children to unintentionally be exposed to adult content.

2. Require all sexually explicit/indecent programming to be shown only after midnight and before 6:00 a.m. so that it will be less accessible to teenagers and children.

3. Cable operators providing PEG channels must provide:

   (a) Written notification at time of cable subscription informing the subscriber of adult programming on designated channels and of the subscriber's option to lock out these channels free of charge.

   (b) Notification of adult programming and free lockout on monthly billing statements, including a phone number which can be called to lock out channels immediately.

4. For the purpose of Section 10, sexually explicit/indecent material shall be defined as including, but not limited to, the following:

Frontal nudity, nude dancing, sado-masochistic behavior, excretory activities, exposed genitals and fondling.

5. Interpretation of "sexually explicit/indecent" shall be made by Local Cable Advisory Committees.

/s/
Virginia B. Bogue
2625 Jetton Avenue
Tampa, Florida 33629
(813) 253-0831

/s/
Amy Lerom
816 South Poinsettia Drive
Tampa, Florida 33629
(813) 872-6865

City of Tampa, Office of Cable Communication
Letterhead

FCC Caption Omitted

COMMENTS ON PROPOSED RULE MAKING
Adopted November 5, 1992: Released: November 10, 1992

Comments Date: December 7, 1992

By: City of Tampa
Office of Cable Communication
306 East Jackson Street
Tampa, Florida 33602

Attention: John M. McGrath, Operations Improvement Administrator

Background:

The City of Tampa, a political subdivision of the State of Florida, is located on the west coast of the state.

The City of Tampa (125 square miles) is served by Jones Intercable Venture Fund 12 (B, C, D), a 60 channel system offering a 47 channel basic cable service package to approximately 55,000 subscribers.

The City of Tampa has within the last few years seen a marked increase in programming on its Public Access channels. Some of this increased programming is perceived by many of the City's residents to be vulgar, obscene, and a detrimental influence on minors. The programs in controversy have included visual depiction of male and female nudity, including but not limited to,

genitalia, simulated sexual activity, and/or sexually related physical contact between performers and audience members, profanity, alleged drug and alcohol abuse as well as acts of masochism and violence.

Tapes containing examples of the above referenced activity has been referred to the local State Attorney's Office for possible criminal prosecution under the State of Florida's obscenity statutes. This Office has to date not yet initiated prosecution. It is perceived at this point in time that while many of the activities involved may be "indecent" they may not necessarily rise to the level of obscenity set forth in the state statutes.

The City, as a result, finds itself severely restricted in its efforts to be responsive to those members of the community who object to the availability of the programming in question. Clarification of the 1992 Cable Act's provisions contained in this proposed rule making are, therefore, of paramount importance to the City of Tampa. Towards that end, we submit the following comments:

INTRODUCTION

1. N/A

2. Liability to cable operations for access programming should be extended to include not only obscene programming but also those areas of speech otherwise protected by the Constitution as well. The current amendment will, however, encourage the cable operator to join with the local franchising authority in taking affirmative steps to preclude the transmission of obscene programming.

3. N/A

LEASED ACCESS CHANNELS: VOLUNTARY PROHIBITION BY CABLE OPERATORS

4. The language of Section 10, amending Section 612(h), providing the cable operators the discretion to exclude any programming it "reasonably believes" to be indecent seems inconsistent with the mandatory language included in subsection (j) aimed at limiting the access of children to

indecent programming.

What, for example, happens in the situation where the cable operator has chosen of to do a written policy prohibiting such programming on leased access and a program qualifying under the proposed indecency standard is submitted?

If the program is not otherwise prohibited, where should the program in question be shown, on the cable operator's regular leased access channel or on the separate blocked leased access channel mandated by the language of Section 612?

While it can reasonably be anticipated that this area may be subject to a prior restraint challenge, it is recommended that the cable operator be required to make an election via written policy, (to be filed with the franchising authority), which precludes all indecent programs outright or follows the specific guidelines for blocked leased access set forth in Section 612(j). This recommendation will avoid the enforcement problem described above.

LEASED ACCESS CHANNELS — INDECENT MATERIAL REQUIRED TO BE BLOCKED

5. The City of Tampa supports the specific provision set forth in this Section with the following clarification: that these provisions requiring a blocked leased access channel and programmer disclosure of indecent content are deemed binding on all cable operators except in those instances where a written policy completely precluding such programming is provided.

6. The City of Tampa supports the adoption of a definition of indecency which incorporates the language applied in the telephone and broadcast medium.

7. The City of Tampa supports the adoption of a "community standards" test unique to the medium of cable television.

8. The blocking approach described in Section 10 as opposed to the "safe harbor" approach (programming within specified

hours) currently applied in broadcast medium is beneficial from an enforcement standpoint. To protect all parties involved, the City of Tampa recommends: (a) the leased access channel on which indecent programming is allowed be audio and visually scrambled; (b) a signed subscriber release be required prior to unscrambling; and, (c) the lock-box option be continued even for those subscribers requesting scrambled leased access channels.

9. The City of Tampa supports limiting children's exposure to indecent programming on leased access channels. The recommendations discussed in paragraph 8, above, would also apply to this issue as well. In addition, program providers should also be required to sign an affidavit affirming that the program in question is not indecent as defined under the cable medium's "community standards" test and acknowledging that the provider not the cable operator is solely responsible for programs aired in violation of said agreement.

10. The City of Tampa does not agree with the interpretation included. Pursuant to the language contained in Section 612(h), the cable operator is granted the discretion to prohibit that programming it "reasonably believes" to be indecent. The City would agree that the language of Section 10 would suggest that the cable operator as well as the program provider would have an obligation to put such programming on a blocked lease access channel unless the transmission of such programming is specifically prohibited pursuant to a cable operator's written policy.

11. The City of Tampa supports mandatory certification provided by the program provider to the cable operator prior to airing that the program in question does not qualify as obscene or indecent under the definition to be hereinafter established. A uniform application of such a certification requirement would be less restrictive and seemingly more content neutral as intended by the language of Section 612(c)(2).

12. The City of Tampa recommends the following time frames

for the provision of adequate notice regarding program content:

(a) seven (7) days notice for pre-produced programs; and,

(b) three (3) days notice for live programs.

(c) If written certification is not received by air date, the program in question is not aired. Absent exigent circumstances defined at the local level, the program provider will not be entitled to a refund of fees assessed for air time.

(d) The cable operator in coordination with the program provider will also have the discretion to air another previously certified program.

(e) Program certification should be retained for the term of the franchise or some other mutually agreed upon time period.

PEG CHANNELS - CABLE OPERATOR-IMPOSED PROHIBITIONS ON CERTAIN TYPES OF PROGRAMMING

13. The City of Tampa recommends:

(a) further clarification of the linkage between the "sexually explicit conduct" referred to in Section 10 for PEG channels and the definition of "indecent" programming developed for leased access channels;

(b) making mandatory the adoption by cable operators of a written policy either completely prohibiting "programming which contains obscene material, sexually explicit conduct or material soliciting or promoting unlawful conduct", or authorizing its transmission under certain limited circumstances such as allowing "indecent" programming to be placed on either a separate public or leased access channel under the same conditions set forth in Section 612(j); and,

(c) the limiting of cable operator control over PEG Access programming to public access only, except in those instances where the cable operator is specifically required to program

the government and educational access channels as well.

14. The City of Tampa supports codifying the new statutory provisions and specifically those related to programmer certification of program content. On the issue of conflicts between cable operators and programmers, a local based method of penalties and dispute resolution is recommended. A suggested grievance procedure might include the following steps:

(a) initial review of complaint by cable operator;

(b) the referral of unresolved disputes to a citizen advisory committee authorized to act in such a capacity;

(c) further review by franchising authority if a resolution cannot be reached; and,

(d) the judicial process.

15. N/A

16. N/A

17. N/A

18. N/A

Cover Omitted

Table of Contents Omitted

FCC Caption Omitted

JOINT REPLY COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA, THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY, THE AMERICAN CIVIL LIBERTIES UNION AND PEOPLE FOR THE AMERICAN WAY

INTRODUCTION

The Opening Comments of the Alliance for Community Media (formerly the National Federation of Local Cable Programmers), the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way demonstrated many of the ways that Section 10 and the Commission's Proposed Rule are unconstitutional. Various other comments — of both operators and programmers — have similarly pointed out the serious constitutional defects of this system of content-based restrictions.[1] Moreover, a number of comments have recognized

---

[1] These constitutional defects have been recognized by operators and owners of cable systems and their trade associations, see, *e.g.*, Blade Communications, Inc. *et al.*, at 2; Community Antenna Television Association, Inc., at 2-3; Cox Cable Communications, at 2, 4, 14; InterMedia Partners, at 8-9; National Cable Television Association, Inc., (continued...)

the utility of lockboxes in achieving Section 10's ostensible goal — protecting children from programming that their parents find inappropriate.[2] Because this type of content-based regulation of protected expression must use the least restrictive means, see *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989), any mechanism more restrictive than lockboxes, such as the Proposed Rule's regulatory scheme, fails to pass constitutional muster.

We continue to adhere to our original position that the Commission has embarked on a course to promulgate an unconstitutional final rule. However, there are serious problems with many of the suggestions put forward by several other commenters — primarily cable operators — allegedly to minimize the unconstitutional effects that they would feel from the Commission's Proposed Rule. While these operators make a host of suggestions for their own economic or regulatory benefit, their proposals would only exacerbate the burdens placed on

---

[1](...continued)
at 3-6, as well as programmers and access centers, see, *e.g.*, Ann Arbor Community Access Television, at 1; Boston Community Access and Programming Foundation, at 3-6; Roxie Lee Cole, at 1; Columbia Community Access, at 1; Community Access Network, Inc., at 1; Judy D. Crandall, at 1; Defiance Community Television, at 1; Denver Area Educational Telecommunications Consortium, Inc., at 5 n.7; David B. Dreety, at 1; Steven C. Fortriede, at 1; Manhattan Neighborhood Network, at 2-3; Erik S. Mollberg, at 1; Waycross Community Television, at 1.

[2] Blade Communications, Inc. *et al.*, at 8; Boston Community Access and Programming Foundation, at 5 (noting that lockboxes provide a less restrictive means of protecting children from indecent programming); Community Antenna Television Association, Inc., at 6-7; Local Governments, at 7; Telecommunications, Inc., at 14 (arguing in favor of lockboxes as a permissible alternative to operator blocking); Time Warner Entertainment Co., L.P., at 10.

programmers' free speech rights, as we discuss in the separate argument sections presented below.

Before examining each of these arguments, we note that several operators have also advanced a different kind of constitutional argument that is seriously in error. For example, Time Warner in both its comments and in separate litigation (*Time Warner Entertainment Co., L.P., v. FCC*, Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992)) argues that it is unconstitutional to require operators to carry access channels because they are thereby associated with messages with which they do not agree.[3] This argument is necessarily predicated on the notion that, with respect to access channels, cable operators are editors with their own first amendment rights. However, because courts recogni[illegible] PEG and leased access channels as a public forum, they have explicitly distinguished access from other cable channels and rejected the contention that operators are editors with their own first amendment rights with respect to access channels. See cases cited in Opening Comments at 36 & n.16.

These operators' erroneous constitutional analysis leads them into misreading Section 10 and offering several highly inappropriate suggestions to the Commission. Because they view themselves as editors of access channels, many operators have forwarded suggestions that would use Section 10 to overwhelm Congress' general intent to preserve access channels as a public forum.[4]

---

[3] For other comments arguing that PEG and leased access is itself unconstitutional, see Blade Communications, Inc. *et al.*, at 1-2; Community Antenna Television Association, Inc., at 2-3; National Cable Television Association, Inc., at 3-4 & n-3; Tele-Communications, Inc., at 2.

[4] Perhaps like Time Warner (who advances such an argument in their lawsuit), these operators hope that the result will be that some court will look to the Commission's final rule to find, first, that the newly heightened level of operators' editorial involvement grants them heretofore unrecognized first amendment rights and, second, that those rights are violated by the requirement that operators must carry access programming.
(continued...)

Section 10, however, contains only a narrow exception to the general requirement that speech on PEG and leased access channels remain unedited. While Congress enacted that part of the 1992 Act to afford the Commission a highly limited basis to address sexually explicit or politically controversial speech, it left intact the general command that "a cable operator shall not exercise *any* editorial control over" PEG or leased access. 47 U.S.C. § 531(e) (PEG; emphasis supplied); 47 U.S.C. § 532(c)(2) (leased access; emphasis supplied). While operators may choose to ignore these general provisions, they remain in force, and the Commission must interpret Section 10 so that it is consistent with the prohibition against operator editing. Thus, the Commission cannot assign to operators the task of defining what material a programmer may not air over a cable system's PEG and leased accessed channels. Rather, it must limit the operator of that system to exercising an option to prohibit programmers from airing that material. Similarly, the Commission must also vest the power to police these channels in an entity other than the operator, whom Congress has forbidden from "exercis[ing] *any* editorial control." Rather, as we pointed out in our Opening Comments (at 58-60), prior restraints are the exclusive domain of the courts. See generally *Freedman v. Maryland*, 380 U.S. 51 (1965).

This construction of the statute is also mandated by the constraints of the constitution. Even under a view that attempts to gain for operators an unprecedented first amendment right to edit access programming, it remains unconstitutional for the government to lodge censorship authority in operators who may then be subjected to liability if they fail to exercise that authority. For that reason, operators cannot be conscripted as "a corps of involuntary government surrogates . . . without providing the procedural safeguards respecting 'prior restraint' required of the government."

---

[4](...continued)
Cf. Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978) *aff'd on other grounds*, 440 U.S. 689 (1979). We submit that this bootstrapped result was not intended by Section 10, and the Commission must therefore reject this approach to the current rulemaking.

Midwest Video v. FCC, 571 F.2d 1025, 1056 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); see also Opening Comments at 58-60 (noting requirement of prior judicial procedures). To do so would impermissibly "subject[] the cable user's First Amendment rights to decision by an unqualified private citizen, whose personal interest . . . enlists him on the 'safe' side — the side of suppression." *Midwest Video*, 571 F.2d at 1057; see also Opening Comments at 30-34 (noting constitutional problems from liability provision of Section 10(d)).[5]

With this background in mind, we turn to specific proposals made in certain comments. As we show below, many commenters would have the Commission forego the restraint that is required of it under both the statute and the constitution. For that reason, we again urge the Commission to adopt the limiting construction of Section 10 that we offered in our Opening Comments. As we demonstrated in those comments, lockboxes are consistent with the PEG and leased access statutes, and they are the least-intrusive means for the Commission to implement any legitimate governmental interest in restricting children from viewing programming deemed inappropriate by their parents. Any other approach will fall below constitutional minima, as we pointed out in our Opening Comments.

---

[5] We thus adopt the analysis of *Midwest Video* that holds that a system for censoring the access channel public forum violates the constitution when it lodges the power to censor with operators who may be held liable for failing to exercise that power. We also recognize that *Midwest Video* incorrectly determined in *dicta* that a regulation requiring operators to carry access channels violated the constitution. This incorrect determination has been rejected by the courts in later cases, which have upheld the statutory requirement that operators carry access channels. See cases cited in Opening Comments at 36 n.16.

SUMMARY

Even if the Commission fails to follow the constitutionally mandated course of recognizing lockboxes as the least restrictive means to effectively implement Section 10, it certainly cannot accept the main proposals forwarded by operators. First, the Commission must reject the suggestions that operators be given the power to edit broadly, pre-screen programming, and/or require certification from programmers. These proposals are either contrary to the statute, unnecessary under it, or potentially violative of the constitution. Second, the Commission must reject the suggestion of operators that they be granted an immunity to censor with impunity. Such an inducement towards widespread censorship fails to afford programmers the first amendment protection they are due. Third, the suggestion for indemnity and proof of insurance from programmers must be rejected because it both is unnecessary under the statute and implicates serious constitutional concerns.

If the Commission decides to wander into constitutionally dangerous territory by rejecting the lockbox course, there are certain suggestions of other commenters it may wish to follow in order to minimize the burden being placed on programmers' first amendment rights. While the Commission should not preempt state and local laws and franchise contracts forbidding operator editing, it should make clear that its national standards preempt state laws with regard to speech not allowed on cable. It should also require operators to unblock a channel upon a phone call from a subscriber. And it should stay the effectiveness of its final rule until courts have completed their review of it. Moreover, if lockboxes are given due recognition, operators should be forbidden from attributing lockbox costs as a cost of providing access. Instead, as the Commission develops regulations for operators' rates, the costs of lockboxes should be considered as a cost of providing cable.

I. THE COMMISSION WOULD HEIGHTEN THE UNCONSTITUTIONAL BURDEN ON PROGRAMMERS IF IT STRENGTHENED THE ABILITY OF OPERATORS TO CENSOR PROGRAMMING

Most of the operators filing comments have requested that the Commission grant them certain powers, beyond those contained in the Proposed Rule, that would strengthen their ability to keep the programming they choose off of PEG or leased access channels. We strongly oppose any such measure. Congress explicitly provided for PEG and leased access in the 1984 Cable Act, and local franchising authorities have negotiated contractual provisions for such channels, for the specific purpose of facilitating unedited programming.[6] To now grant the very same operators unbridled editorial discretion would contravene the clear intent of Congress. Moreover, it would exacerbate the unconstitutional burdens on speech that we discussed in our opening Comments.

The most blatant proposal in this regard comes from operators such as those who filed comments along with Acton Corp., who insist that they must have "broad discretion" to both establish and apply censorship standards because "different operators [have] different editorial positions." Acton Corp. *et al.*, at 2, 5. By its very nature, however, such a sweeping proposal would impermissibly allow wholly standardless censorship. The only government interest that even arguably supports Section 10 is the protection of children from programming deemed inappropriate by their parents, not the furtherance of each operator's unique editorial viewpoint. The Commission must therefore reject the proposal that

---

[6] Despite these protections, some cable operators have attempted to impede access programming, as is demonstrated by the articles attached as Appendix A to these reply comments. If the Commission were to grant operators editorial power over programming, these instances are likely to multiply.

it read Section 10 to abrogate the general prohibition against operator editing, which remains intact."[7]

Certain of the commenters who make this proposal apparently recognize that it would allow censorship beyond constitutionally permissible bounds. Having asked for unbridled discretion, for them "[i]t is then irrelevant under the statute whether either the Commission or a court would reach the same conclusion as the cable operator." *Id.* at 3-4. The conclusion that courts would reach is of course relevant, however, for it is only they who can determine what speech is not deserving of constitutional protection. Indeed, as we pointed out in our Opening Comments (at 58-60), the prompt application of such judicial process is a necessary component of any constitutionally permissible content-based prior restraint on speech.

For these reasons, the Commission must emphatically reject operator proposals that seek broad editorial discretion. If the least-restrictive lockbox regulatory approach is rejected, the Commission — in order to avoid promulgating a regulation that is also overbroad — would have to clarify that programmers may be barred from including in their material only that speech which is constitutionally

---

[7] In any event, we note that the editorial policies of some operators are to program non-access channels with sexually explicit material even as they seek to ban such material from access channels. For example, although Time Warner lists in its comments a handful of access programs it "would not choose to provide" (at 3-4), it neglects to inform the Commission that the highest rated documentary series carried on its Home Box Office division is called "Real Sex." "Real Sex" has highlighted segments such as, *inter alia*, a home striptease class and a studio that makes pornographic films for women. See Appendix B. As we discussed in our Opening Comments (at 49-54), the Commission has failed to rectify the constitutional problems of banning material from access channels while allowing it on other channels. If the Commission does not adopt the lockbox approach, it should therefore "prevent operators from prohibiting from access channels the same type of programming it carries on other of its channels." *Id.* at 50-51.

unprotected, as defined by the Commission.[8] In addition, rather than allowing an operator to make its own determination as to whether a particular program falls outside the scope of constitutionally protected speech, the Commission must clarify that only a court may declare that a program is obscene and order it kept off the air.

No less problematic is the suggestion by several operators that the Commission's final rule contain a provision that would allow them to pre-screen programming before it is aired on PEG or leased access channels.[9] Pre-screening is highly objectionable for several different reasons. First, by allowing pre-screening, the Commission would place operators in the position to make specific editorial demands before giving final approval.[10] Such editorial control flatly contravenes the PEG and leased access statute — which retains at its core the principle that speakers who use PEG and leased access channels must be allowed to program without regard

---

[8] If a lockbox regulatory approach is rejected, confirming PEG censorship to Commission-defined speech becomes a necessary implication of Section 10(c) of the statute. Section 10(a), on the other hand, concerns speech over leased access channels that an operator "reasonably believes" is indecent. Nonetheless, the Commission should treat leased access in the same manner that the statute treats PEG to avoid constitutional difficulties. As we pointed out in our Opening Comments, prior restraints can only attach with the guarantee of a prompt court determination that some constitutional standard would otherwise be violated (at 58-60); they cannot be imposed under standards developed by a non-neutral entity whose own liability may prompt it to censor widely (at 30-34). Allowing operators to censor based on their subjective beliefs would violate these first amendment principles.

[9] See Acton Corp. *et al.*, at 5; Blade Communications, Inc. *et al.*, at 12; Continental Cablevision, Inc., at 5-6 (advocating pre-screening if the Commission rejects a certification system); InterMedia Partners, at 4, 18.

[10] The suggestion of some operators that they should "be able to impose monetary penalties on programmers," see Acton Corp. *et al.*, at 8, must be rejected for similar reasons. To give operators the power to penalize programmers would also implicitly grant them the power to make editorial demands in advising programmers how to avoid those penalties.

for the operator's editorial preferences. Second, as we pointed out in our Opening Comments (at 26-27 & 32), any pre-screening requirement would likely eliminate all live programming, including call-in shows, regardless of whether they contained prescribable speech. Third, several operators have noted the inordinate expense that pre-screening occasions. See, *e.g.*, Community Antenna Television Association, Inc., at 3-4; Time Warner Entertainment Co., L.P., at 19.

Moreover, pre-screening as proposed by the operators would also violate the first amendment in two ways. First, the pre-screening proposals contain no reasonable time limits. By allowing an operator the power to threaten indefinite delay, such pre-screening would constitute a prior restraint that exacerbates all of the problems of allowing operators to exercise unbridled editorial control over access programming. Put another way, such pre-screening adds the element of unrestrained delay and necessarily places all programs under a prior restraint: even programming that does not contravene an operator's editorial policy will necessarily be delayed from airing, regardless of how timely it is.

Second, the pre-screening proposals forwarded by operators call for unreviewable discretion. For example, InterMedia Partners pronounces that, as part of its proposed pre-screening, "InterMedia's determination as to whether a particular program complies with its policy will be the *final* determination." Intermedia Partners, at 7 (emphasis added); see also Tele-Communications, Inc., at 2 (urging that no dispute resolution mechanism is necessary because the operator's decision should be final). This unaccountable exercise of power necessarily raises the prospect that arbitrary or irrational decisions will go unchecked. In contrast, the constitution requires prompt judicial procedures, as we

discussed in our Opening Comments at 58-61.[11] For these reasons, as well, the Commission must reject pre-screening.

Several operators have also requested that the Commission allow them to require programmers to certify that their programming does not fall outside of the operator's policy regarding allowable speech. An integral part of this certification proposal would immunize operators from liability for carrying programs certified not to be indecent, but later held to be so. The Commission should reject these proposals because certification should not be necessary to insulate operators from liability when they allow access programming to air, as the PEG and leased access statutes require them to do. At most, the Commission's final rule should state that no liability will attach to an operator if a programmer violates the Commission's rule and an operator's policy against indecent programming.

As an initial matter, we note that the operators' perceived need for certification and its attendant immunity for failing to censor apparently stems from their mistaken assumption that Section 10 has given them editorial control over PEG and leased access channels. However, as we have discussed above, see *supra* at 3-5, the 1992 Act has not amended the portion of the PEG and leased access statutes that *prohibits* operators from exercising *any* editorial control over these channels. Operators are therefore not placed in an active position with regard to editing PEG and leased access. Because liability should only be predicated on operators actively speaking or editing, liability should not lie in this instance. See generally *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525 (1959).

---

[11] Moreover, the NCTA notes that pre-screening would allow an operator to "both prohibit some programming and choose not to prohibit other programming." National Cable Television Association, Inc., at 9 n.8. Such unequal selective screening raises the specter of an unconstitutional system that allows speech to be regulated "based on hostility — or favoritism — towards the underlying message expressed." *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992) (quoted in Opening Comments at 53 n.25).

Consequently, to allay the fears of operators concerning liability, the Commission's final rule need only clarify that an operator cannot be held to be a liable party when a programmer violates that operator's policy and the Commission's standards prohibiting the broadcast of indecency. As InterMedia Partners pointed out in its comments (at 15), the Commission has followed a similar approach in *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 F.C.C.R. 2819, 2820 (1987), when it stated that "[u]nless an MDS common carrier has actual notice that a program has been adjudicated obscene . . . it will not be subject to adverse agency action." In the case of access programming, as in the earlier MDS context, there is neither "a high degree of involvement" nor the "actual notice of an illegal use" on which operator liability may be predicated. Because operator liability thus should not be implicated, there is simply no need for the Commission to require that programmers certify the content of their programs. Even without a certification, the operators should face no liability.[12]

In any event, a certification requirement such as that proposed by operators may very well be considered vague when viewed from the perspective of a lay programmer who is not tutored in fine first amendment distinctions. For that reason, a court might very well strike down such a requirement under the first amendment. *See, e.g., Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 782 (C.D. Cal. 1991) ("'a conscientious applicant who takes the certification seriously is thus compelled to avoid undertaking any project that might even arguably violate' the vague certification requirement" that a production not fall short of the *Miller* obscenity standard) (citation omitted). Certification in this regard could be likened to an oath, which may similarly be considered unconstitutional if it chills speech by forcing self-censorship on the part of those who are unsure of whether they meet the implicated

[12] Under the operator's own justification, therefore, if the Commission were to adopt certification, it should at most go only so far as to have programmers certify that they recognize and accept their own liability if they fail to live by an operator's policy and the Commission's standards.

standard. See, *e.g.*, *Baggett v. Bullitt*, 377 U.S. 360, 373-74 (1964); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (oath takers "steer far wider of the unlawful zone"). Rather than implicating these constitutional concerns, the Commission should reject the operators' certification proposals.

While each of these several different ways of strengthening operators' power to censor programmers is therefore inappropriate, we note that several commenters have urged that the Commission simultaneously adopt several or all of them.[13] However, viewing these measures as somehow complementary is especially wrongheaded. To the contrary, if the Commission were to consider any one of these proposals appropriate despite the problems it poses, its implementation would negate the need for any other. For example, if certification (with its attendant immunity) were implemented, there would be no need for pre-screening. Because an operator would be held harmless for carrying programming mistakenly certified as not indecent, that operator has no reason to screen certified programming to determine whether or not program content meets operator standards. In this way, each of the operators' proposals are duplicative, and the Commission would be unnecessarily multiplying the burden on programmers' free speech rights if it were to adopt a number of them.

II. THE COMMISSION WOULD FURTHER HAMPER PROGRAMMERS' FREE SPEECH IF IT IMPLEMENTED SUGGESTIONS REGARDING OPERATOR LIABILITY

Several operators have requested that the Commission expand its Proposed Rule in two ways to minimize the liability operators may face for censoring PEG and leased access programming. First, several operators seek a blanket immunity from liability whenever they act as censors, regardless of the reasonableness of their activities in this regard. Second, many operators propose that the Commission's final rule grant them the power to require

[13] See Acton Corp. *et al.*, at 3-5; InterMedia Partners, at 14, 18; Blade Communications, Inc. *et al.*, at 12; National Cable Television Association, Inc., at 8-9.

programmers to indemnify operators and provide proof that they carry sufficient insurance to cover any such contingent liability. For reasons we now discuss, the Commission must reject all such proposals because they are both contrary to the requirements of the constitution and inappropriate under the statute.

The proposals to immunize operators' censorship add an unnecessary additional burden on the first amendment rights of programmers. All of these immunity proposals would prompt operators to censor as widely as they can in order to avoid even the most remote possibility of liability under Section 10(d) for carrying a program that "involves obscene material." See, *e.g.*, InterMedia Partners, at 6 ("InterMedia will interpret and apply this restriction broadly"). As we discussed in our Opening Comments (at 28-34 & 38-42), the impetus towards broad censorship created by the liability provision of Section 10(d) is not narrowly tailored to implement a compelling governmental interest, and it therefore contravenes the constitution. For a similar reason, the proposals to grant operators an immunity from liability must be rejected by the Commission: they would create a further incentive for operators to engage in standardless censorship and thereby chill the first amendment rights of access programmers.[14]

In a similar vein, several of the operator commenters have asked the Commission to include provisions in its final rule that would allow operators to require that programmers guarantee indemnification and provide proof of insurance concerning any possible operator liability. For both statutory and constitutional reasons, the Commission must reject the proposals to enshrine indemnification and insurance provisions in its final rule. First, there is no reason to read into the statute any concern with

[14] We also note that such an immunity is unnecessary under the statute. As we demonstrated above, operators are not active PEG and leased access programmers and hence should not face the risk of liability absent actual notice of a prior court action finding a particular program obscene. Consequently, immunity for censorship — an activity operators should not be engaged in — is contrary to the prohibition that they not edit access programs.

indemnification or insurance issues. Potential liability from programming arises from a wide variety of theories (such as negligence in the act of filming a show) under which a plaintiff may name the operator. The operators now seeking indemnification and proof of programmer insurance have failed to suggest any basis to differentiate liability with regard to program content from all of the other forms of potential liability, with regards to which indemnification issues have long been successfully handled on a case-by-case basis under the common law.[15]

Second, the Commission should avoid widening its rulemaking to reach indemnification and proof of insurance issues because such requirements may raise first amendment concerns. A concern with only the content of speech that is to take place in a public forum affords "no justification for insurance or hold harmless conditions . . . [and] they may not constitutionally be imposed" by the government. *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont. Md.*, 700 F. Supp. 281, 286 (D. Md. 1988). When crafted with regard to content-based liability, indemnification and insurance requirements necessitate an impermissible examination of the contents of the proposed speech, and they impermissibly levy a heavier financial burden on controversial speech. *Collin v. Smith*, 578 F.2d 1197, 1207-09 (7th Cir.), *cert, denied*, 439 U.S. 916 (1978).[16] Moreover, the proposals that the operators have forwarded in this docket are not only content-based, but they ask the FCC to adopt a standardless regulation. Under these proposals, both the amount of the insurance demand and the decision of whether or not to make that demand would be left to the unfettered discretion of operators. This standardless discretion is inappropriate in all prior restraint contexts, but especially where the

[15] Insurance is an apt consideration in one regard. Operators who are concerned with liability for censoring PEG or leased access may purchase their own insurance to protect themselves against their own negligence.

[16] For the same reason, the Commission must also reject as constitutionally infirm the suggestion of operators such as Acton Corp. *et al.*, at 8, that programmers be required to post a bond before being allowed to program on the PEG and leased access public forum.

decisionmaker has declared that it will exercise that discretion with the content of speech in mind. *Forsyth County, Ga. v. Nationalist Movement*, 112 S. Ct. 2395 (1992).[17]

III. WHILE SOME NATIONAL STANDARDS SHOULD BE ADOPTED, OTHERS ARE WHOLLY INAPPROPRIATE

Several programmers also argue that the Commission should adopt uniform national standards on certain matters. While we support some of these efforts, others clearly raise serious problems.

Foremost among the objectionable proposals is that which concerns federal preemption of provisions of state laws, local ordinances and franchise contracts that prevent operators from editing access programs. See Continental Cablevision, Inc., at 6-8. As an initial matter, Section 10 is not phrased in the mandatory terms that would preempt state and local regulation of the franchise process. In other words, while Section 10 states that an operator may choose to adopt certain censorship policies, it neither vests that choice exclusively with the operators nor removes states and localities from playing their role in the process. Moreover, the preemption that is urged would abrogate existing franchise contracts, whereby operators have voluntarily agreed not to edit access programming. Nothing in Section 10 indicates that it is intended to abrogate existing contracts whereby operators have already exercised their options and decided to allow all types of programming — including sexually explicit or politically controversial material — in its access channels.

Preemption may nonetheless be appropriate in one circumstance. If the Commission fails to follow the least restrictive lockbox approach, it must carefully define the categories of speech which it would allow operators to ban if it is to avoid also violating the constitution through an overbroad regulation. See Opening

---

[17] The reasoning discussed in text applies equally whether it is the programmer who would be required to provide proof of insurance or, as has also been suggested, an access center that administers the access requirements over a particular cable system. See Blade Communications, Inc. *et al.*, at 14 n.13; InterMedia Partners, at 7.

Comments at 54-57. Thus, as we suggested in our Opening Comments, the Commission should follow its prior indication to narrowly construe "unlawful conduct" and "sexually explicit" in the PEG standard.[18] In the same vein, the Commission should clarify that those standards preempt any others that may be found in state or local laws or ordinances. Similarly, the Commission should require that any sexually explicit or politically controversial material be weighed against the value of the programming when taken as a whole, and it should clarify that its mandate in this regard is preemptive. *Accord* Time Warner Entertainment Co., L.P., at 6-8. It should also define, with preemptive force, the relevant community to be cable subscribers.[19]

Finally, the National Cable Television Association, Inc. ("NCTA") in its comments proposes a national standard with respect to how subscribers nay request unblocking of the channel dedicated to indecent leased access programming. As we demonstrated in our Opening Comments, any system of central blocking is unconstitutional in light of the effective, less restrictive, lockbox mechanism. Were it not for lockboxes, we would agree that a uniform national standard for unblocking should be adopted, although we would still oppose the one offered by NCTA, which would delay the viewer's right to receive requested programming for sixty days. Such a burden on viewer's rights is unnecessary and therefore unconstitutional. Rather, if the Commission fails to adhere to the least restrictive lockbox approach, at a minimum it should require all operators to implement an unblocking system that mirrors the system currently used for pay-per-view services. After

---

[18] For the reasons expressed in both the Commission's Notice and our Opening Comments, the Commission should reject the broad reading of these terms by InterMedia Partners and Acton Corp. *et al.*

[19] Blade Communications, Inc. *et al.*, at 7-8, suggest further segmenting the relevant community by tier of cable service. This approach should be rejected as unworkable, however, because only operators have information regarding the constituents who subscribe to each tier of service. Additionally, it is unnecessary, because access channels are available on several different tiers.

a subscriber has mailed the operator a written request to activate his ability to lift the block on the leased access channel,[20] the subscriber should be able to place a phone call to be able to receive that service with no further delay.[21]

IV. THE COMMISSION SHOULD IMPLEMENT CERTAIN OTHER COMMENTERS' SUGGESTIONS WITH IMPORTANT MODIFICATIONS

A number of commenters have forwarded two suggestions with which we agree, at least with important modification. First, several commenters have recommended that the Commission include in a cable system's rates whatever costs operators incur in implementing Section 10 and the Commission's final rule. See Community Antenna Television Association, Inc., at 7; Continental Cablevision, Inc., at 10-11.[22] We agree with these commenters, but only for lockboxes. The sensible approach to paying for lockboxes is to include their costs in developing regulations for cable operators' rates. This sensible approach to cost spreading will also allow the Commission to further assure that no parents are deterred from using lockboxes to keep their children from viewing programming

---

[20] In all instances, the Commission should prescribe the form of request an operator is required to present to subscribers. In order to protect subscribers' privacy, see 47 U.S.C. § 551, that form should be phrased in neutral terms that do not allow the operator to build a record that the subscriber has requested sexually explicit or politically controversial programming.

[21] Moreover, the operator should be required to ask new subscribers as part of their initial subscription questionnaire whether they want all access channels unblocked.

[22] Other commenters make objectionable suggestions with regard to who should bear these costs. Cox Cable Communications, at 10-11, suggests that those subscribers who request unblocking should bear the cost of blocking. This suggestion should be rejected because it places the burden of paying for blocking on precisely those subscribers who do not find it a benefit. Similarly, the suggestion that programmers pay the cost of blocking, see Blade Communications, Inc., *et al.*, at 9-10; InterMedia Partners, at 20, also further burdens those who do not find censorship to be a benefit.

that they deem inappropriate.[23] Of course, since lockboxes are effective for this purpose with respect to all channels (and not just PEG and leased access), the Commission should concomitantly clarify that cable operators cannot attribute the costs of lockboxes as a cost of providing access.[24]

Second, we agree with the comments of Continental Cablevision, Inc., at 9, 13-14, to the extent that they urge the Commission to recognize that, if the Commission fails to adhere to the lockbox approach, all cable operators will need at least 120 days before they can implement the Commission's final rule. The Commission should further clarify that during the necessary interim period of delay, all provisions of Section 10 are to be stayed. Moreover, the Commission should recognize the potentially serious constitutional difficulties raised by its rulemaking. The stay should therefore include whatever period is necessary for the courts to complete their review of this scheme, should such review be initiated.

CONCLUSION

Both operators and programmers appearing as commenters in this docket have agreed that the censorship scheme envisioned by the Commission's Proposed Rule would be unconstitutional. None of the suggestions forwarded by operators would cure these problems. To the contrary, they would only exacerbate the first amendment concerns raised by Section 10 and the Proposed Rule.

---

[23] As we noted in our Opening Comments, even with their associated expense, the Commission has on several occasions found that lockboxes are effective. See Opening Comments at 47.

[24] Moreover, as a generic matter, operators who voluntarily choose to censor PEG channels pursuant to Section 10(c) or leased access channels pursuant to Section 10(a) should not be allowed to include the costs of that voluntary activity as a cost of providing access or for any other purpose.

We therefore again urge the Commission to recognize lockboxes as the least restrictive means of effectively implementing Section 10.

Respectfully submitted,

/s/

I. Michael Greenberger
David A. Bono
Shea & Gardner
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for the Alliance For Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way

Of Counsel:
James N. Horwood
Spiegel & McDiarmid
1350 New York Ave., N.W.
Washington, D.C. 20005
(202) 879-4002
Counsel for the Alliance for Community Media and the Alliance for Communications Democracy

Marjorie Heins
American Civil Liberties Union Foundation
Arts Censorship Project
132 West 43rd Street
New York, New York 10036
(212) 944-9800
Counsel for the American Civil Liberties Union

Andrew Jay Schwartzman
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036
(202) 232-4300

Elliot Mincberg
Sonia Bacchus
People for the American Way
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999
Counsel for People for the American Way.

Dated: December 21, 1992

Appendix A

Linda Haugsted, *Warner, Access Group in Shootout*, MULTICHANNEL NEWS, May 20, 1991 at 1

There's a gunfight brewing at the PEG corral in Houston, and if the city's public access group has its way Warner Cable will lose its franchise.

At one end of the street is Warner Cable Communications, Inc. of Houston, which is facing down Access Houston Cable Corp. Access Houston is armed with a franchise document that, its executives believe, gives it the right to decide what will be programmed on a new educational access channel, an assertion being challenged by the operator.

Bystanders include the International Channel, the Silent Network and Mind Extension University, all satellite services that the access group wants to schedule on the new channel.

The dispute has arisen over a deceptively simple question. What constitutes "local" programming?

Warner has one education channel and has been reserving a channel slot for a second such service. Access Houston determined that there was sufficient interest to activate the second channel by May 1.

Warner was agreeable until it found out that Access Houston wanted to use Vietnamese and Chinese language programming from the International Channel, programming for the deaf and ME/U selections, in addition to French lessons and classes from the University of Houston, on the second channel.

According to the satellite services, there are precedents for such programming: ME/U and Silent Network are on educational channels elsewhere, but the International Channel is not.

In a letter to the city dated April 19, system president James Daley said Warner will not cablecast the satellite-delivered programs because they are not appropriate for a local access channel. He added that satellite programming generates costs that Warner should not have to pay.

Pam Thorne, director of public relations for the system, said delivering the satellite service would cost Warner

Houston $85,000 to $100,000 for a new satellite dish and other support hardware. PEG stands for public educational and government channels.

The city's attorney, Clarence West, wrote back that Warner's interpretation of its obligation was erroneous, saying that as the local educational authority, Access Houston has the power to determine scheduling to meet special audience needs.

A blackout of its choice of shows would "violate the letter and spirit of the franchise" and represents an attempt at editorial control in violation of federal law. West also wrote that Warner is responsible for any "reasonable and appropriate" expense incurred by satellite programming.

Refusal to cablecast the programming scheduled by Access Houston represents a franchise violation, the attorney warned, adding that if the educational channel did not run by May 15, Warner would be considered in violation of its franchise. The system negotiated a extension of the compliance to May 23.

Revocation is the only punitive remedy mentioned in the franchise for material breach of contract.

"I suspect the city will begin that process [revocation] ... the council seems amendable. I expect to fight this all the way," said Tomas Cantrell, executive director of Access Houston.

He said satellite programming would not generate significant cost to Warner. Warner is already "looking at the appropriate birds," he said. Warner carries C-SPAN, which is on Galaxy 3 with ME/U; and the International Channel and Silent Network are on Satcom F4. Warner turns to Satcom F4 for its pay-per-view special, Cantrell added.

Thorne Said Warner is not "already looking at the right satellites," adding that $100,000 doesn't seem to be a "reasonable and appropriate cost" for the new channel.

Cantrell said Warner's opposition has angered some segments of the community. A group of 40 Silent Network supporters picketed the operator at the beginning of May bearing signs reading "Shame," according to local reports. But Thorne said that before the access flap began, the system

was talking with the city council about cablecasting some Silent Network programming on a municipal access channel, an agreement that is still possible.

The dispute leaves the programming networks in a awkward position; they want access to the community, but not at the cost of alienating a large MSO. Some did not want to discuss the dispute.

Andy Holdgate, vice president of ME/U, said that where his service is on educational access in other markets, the programming decision was made mutually and amicably by access and system officials.

"We enjoy the fact that our carriage has been mutually supported. We're hopeful that, in time, we can be available (in Houston), but we recognize that there are specific issues between the franchiser and franchisee that need to be cleared up," he said.

Lawyers familiar with cable franchising disputes contacted by MULTICHANNEL NEWS said access requirements could become a hot legal area in the next few years, since it is an area uncharted by legal precedent. "Local" is often ill-defined, in a legal sense, in documents.

One attorney, who asked not to be named, gave an example of the dilemma facing companies: If a local producer makes a documentary on France, is that local programming? Or is a documentary on Houston, directed by Frenchman?

As for whether Warner faces a serious threat of revocation for material breech, attorneys said a judgment would have to be based on the franchise document, the company's original response to a request for proposals and the articles of incorporation of the access corporation and any other contracts between the city and company.

The intent of each of the parties would be determined through these documents. But as a practical matter, every major issue can be solved by compromise, they said.

Compromise is just what Thorne anticipates.

"We are working with the city to put this to rest," she said.

Linda Haugsted, *Warner Cable Houston Up for Renewal*, MULTICHANNEL NEWS, July 22, 1991 at 14.

Refranchising negotiations for Warner Cable Houston began last week amid allegations that the operator censored a public service message soliciting comments on its performance.

The charges were hurled by Access Houston, the operator's access corporation, with which the system has been feuding.

Warner initially declined to run the inflammatory spots proposed by Access Houston on its educational channel.

The spots included statements such as, "Tired of paying among the highest rates in the country for cable TV? Tired of bad reception? Did you know that you pay among the highest rates in the United States for cable TV?"

Also mentioned in the spots was the absence of Mind Extension University, The International Channel and the Silent Network, networks that Access Houston wants programmed on a second educational channel.

Warner has declined to run them there, however, stating that the programming is not local and that the new additions would cost too much. Access Houston has sued the cable system over this issue.

The spots also urged subscribers to attend the first public hearing on refranchising Warner Cable, held July 16, or call a municipal cable TV hotline to register concerns about cable service.

Access Houston notified the local press about Warner's refusal to show the spot, as well as soliciting the support of the city attorney's office to compel Warner to cablecast the meeting notice.

The controversial spot was cablecast the day before the meeting, officials said. Regarding the censorship charge, Warner told the local press, "This hearing was widely publicized."

The publicity on the issue may have driven calls to the city's cable hotline, noted Rhonda Andrews, administrative manager, regulatory affairs for the city.

More than 350 calls, "generally negative," came in by hearing time, she said. Consumers' top complaints were

picture quality and programming choices.

The system is using all available channels now, including some that suffer seepage from broadcast stations. Most of these ingress channels are programmed with public access, Andrews said.

On the programming issue, callers said they'd like to see some programming services not currently offered, most frequently naming American Movie Classics and Bravo. Andrews added.

At the public hearing before a committee of the City Council, Warner was lauded for its community projects by many of the charities it has aided, by local businessmen who deal with the company and teachers who use Cable in the Classroom.

But it was also dunned by some of the 54 speakers, several of whom were access producers or affiliated either with Access Houston. Of the speakers, Andrews judged that one-third were affiliated with Access Houston or Warner and two-thirds were members of the general public.

At the hearing, the impartiality of one of the council members was questioned. Warner's critics circulated financial disclosure forms of Councilwoman Christin Hartung, alleging that she was a stockholder in the cable company's parent, Time Warner Inc., and had received a political contribution from the cable company's local president.

The councilwoman told local reporters that the stock is actually her husbands's and that the donation does not necessarily mean that she supports the contributor.

The hearing was only the first volley in the refranchising process. Warner's current franchise expires in 1994, and the company has not yet proposed any operational changes under a refranchise, said Andrews. Two more public hearings will be held as part of the refranchising process.

System Notes, MULTICHANNEL NEWS, July 22, 1991 at 43.

MASSACHUSETTS

* * *

· **Springfield**: Springfield's consultant on Continental Cablevision will survey community access users to see if a group of disgruntled program producers has valid arguments with the firm. Group cites lack of access to facilities, worn and worn out equipment, staffing problems and an "unclear" budget. Continental has said it has fulfilled its license agreement to provide public access.

NEW JERSEY

· **Old Bridge**: "Big MAC" — the town's municipal access channel — operates on "no budget," according to its executive director for programming, but subsists on corporate donations of equipment and the elbow grease of volunteers. The community bulletin board service cablecasts over channel 29 on the TKR Cable Co. system here. Still, "Big MAC" plans to move from cramped quarters of the Town Hall to a proposed addition to the central Old Bridge Public Library. Channel will also ask township council for $10,000 next year to pay for editing equipment and to prepare town council chambers for cablecasts.

* * *

PENNSYLVANIA

* * *

· **Altoona**: Area public library officials went to meet with Warner Cable Communications' manager to discuss company's assertion to a citizens cable committee that library's media center in a local hotel is also Warner's local studio. Library officials said that although Warner Cable has equipment there, and cablecasts local access programs from the center, cable company pays no rent and provides no maintenance. Cable committee had been trying to find out whether Warner was living up to all stipulations of franchise, which specifies that Warner maintain a studio in Altoona, according to a library official.

Appendix B

Jerry Adler with Vernon Church, *Was It Good for You, Too*, NEWSWEEK, February 24, 1992 at 63

"Real Sex" is the ultimate reality in programming.

BODY:

If you've ever wondered if you have what it takes to be on TV . . . well, "Real Sex," on Home Box Office, proves that you do. The people having sex on "Real Sex" are human beings just as God made them. If you've forgotten what women look like without breast implants, the women on "Real Sex" will remind you. The men on "Real Sex" invite comparison to no other species. In answer to the question that Americans have asked since the start of the sexual revolution -- do people really do that? -- the show proves not only that they do, but that they use the same body parts you saw in the shower this morning.

"Real Sex" has all the virtues of improvisation: no discernible premise, no host and virtually no celebrities. The first 45-minute-long segment, which has been shown a dozen times since November 1990, revealed the goings-on at a women's vibrator workshop, a home striptease class and a studio that makes pornographic movies for women. The premiere was HBO's top-rated documentary for the year. A second installment also has been shown 12 times, and a third will debut on Feb. 22. It is always shown late at night. Executive producer Sheila Nevins insists the show has not "crossed any sexual boundaries. We don't show intercourse, we don't show erections. Considering its success, the quotient of criticism from the audience is minuscule." She didn't describe the response from people not in the audience, but HBO has been uncommonly modest about the show, taking several days even to come up with someone to speak about it on the record.

Yeasty name: Throughout, "Real Sex" has kept the same tone, blithe and uplifting and full of relaxed, happy post-orgasmic smiles. "Real Sex" was conceived at a time when "it seemed like life was getting pretty depressing and sex had become mortally wounded and if we could do a program about safe sex that had a sense of humor people could laugh free of charge," says Nevins. That explains a lot about the show,

including the home-porno sequence of a man in a propeller-topped dildo beanie, and the fact that the women's pornography producer, "Candida Royalle," seems to have chosen a stage name strongly reminiscent of a vaginal yeast infection.

But there's also lots to be learned about "Real Sex," even for people who may have had it once or twice themselves. Experience the chaste thrill of going on a date with a beautiful 31-year-old dancer who wants to stay a virgin! Find out about the tupuli, supposedly a Cherokee term for "the sacred black hole of creation" (a linguist at the Cherokee Nation of Oklahoma said he'd never heard of it); learn to make love the HBO-Cherokee way, by "placing your tipili in front of the tupuli" and moaning on a blanket. Hear "Auntie Maim" explain why "business executives, lawyers and air-line pilots" pay $175 to be handcuffed to a wall and whipped by a woman in a leather collar. (It's because it's a relief for them not to have to be in charge.) Discover what's really on the minds of savvy Nevada prostitutes. (How to save for their retirements.) And remember, someday "Real Sex" might make you famous for 15 minutes, in which case . . . well, try to make it last 15 minutes.

Cover Omitted

FCC Caption Omitted

Reply Comments of Cambridge Community Television

Pursuant to the Commissions Notice of Proposed Rulemaking ("NPRM"), Cambridge Community Television ("CCTV") submits these comments on the comments due December 7, 1992 on the proposed regulations implementing the provisions of the Cable Consumer Protection and Competition Act of 1992 ("Act") relating to indecent and obscene programming.

CCTV, founded in 1987 is the independent non-profit corporation providing community access to television services to residents, organizations, and business in Cambridge, MA. CCTV has a 15-year contract with Continental Cablevision. This contract is incorporated into the license issues by the City of Cambridge.

CCTV receives 3% of the gross annual revenues of the Cambridge system to operate 4 community access channels and a television production facility in One Kendall Square, Cambridge. Since CCTV opened in 1988 over $1,000,000 in free video production services, more than 15,000 hours of programming, and more than 1,500 residents trained in video production. CCTV is recognized as one of the leading access centers in the country.

CCTV did not provide a response to the NPRM due December 7 because our interests were being represented by the Alliance for Community Media. We would also wish to draw the Commissions attention to the comments of the Boston Community Access and Programming Foundation which is located across the river from Cambridge. However, after reading the comments submitted by Continental Cablevision in which CCTV was essentially named in

footnote #3, the Board of Directors of CCTV felt that it was their responsibility to reply.

We wholeheartedly agree with the statement by Continental "urging the Commission to adopt a regulatory scheme that minimizes the operators editorial intrusion in access programming so long as their liability is correspondingly minimized. (p.2)" We feel that if producers are going to be given the rights to access cable television channels they, and not the cable operator, should also take the responsibility for their programming.

Although Congress included language requiring the Commission to promulgate regulations to "prohibit the use . . . for any programming which contains obscene material . . ." we can not imagine that the Congress wanted to create a de facto banning of live programming or of indecent programming. Nor do we feel that the Congress wishes to stifle access to one of the only media forms available (community access cable) by groups which otherwise have no access to media outlets. Congress is looking for a reasonable solution to a rare occurrence.

We recognize that programming mentioned in the Act creates difficulties, but just because something is difficult does not mean it should be prohibited. There are mechanisms which CCTV has instituted in recognition of difficult programming. For example, we run a disclaimer on programming which may offend a cable viewer. The responsibility is on the shoulders of the producer to flag a difficult program. In addition, any difficult programming is shown as late as possible in our cablecast day. Producers who violate our policies will be suspended from using CCTV's facilities.

Where CCTV disagrees with Continental is in the event that the operator remains liable therefore the "operator must be afforded the discretion to exclude material that the operator reasonably believes to be obscene. And the operator must be permitted to ask for certification regarding a broader category of programming than obscenity—sexually explicit material, for example—so that the operator can review the sexually explicit programs to decide if it reasonably believes any of it obscene. (p.4-5)" . . . and . . . "1) the cable operator must be permitted to make its own determination . . . notwithstanding any certification that material is obscene and

should be excluded 2) word its certification request in whatever form it desires . . . ."

The cable operator is not the best authority to determine whether or not a program is obscene, sexually explicit, or promoting unlawful conduct (even with the caveat of NPRM footnote 11). It has been difficult enough to define obscenity. What is the definition of sexually explicit or unlawful conduct? Generally, there is not the personnel on the local level sufficiently schooled in the First Amendment to make these decisions. If rulings are based on an operator by operator basis there will be further problems of definition if an operator in one community has different interpretation of the "sexually explicit/unlawful conduct programming" from an operator in an adjacent community.

If the Commission insists that the operator has full liability perhaps a matter should go to an advisory board consisting of producers, citizens, cable operator personnel, access staff, City officials, etc. to make case by case decisions. This would at least afford some level of protection for the operator. The Commission may also want to consider language similar to that in the recent CPB Reauthorization Act which called for the FCC to "promulgate regulations..the broadcasting of indecent programming between 6 a.m. and 10 p.m. on any day by a public television station that goes off the air before midnight." (106 stat.964 public law 102-356, August 26, 1992)

Continental urges the commission to "prevent transforming these problems into a de facto ban on indecent programs." (p.2) We urge the Commission to not allow the operator to transform any regulations into a similar de facto ban on indecent programs. Any attempt to have the cable operator decide whether or not a program is obscene will have detrimental effects on that operator. Will the operator have to devote staff time to pre-screen all programs? The operator will be the judge and jury and have to function in the court of public opinion as well. What a position to be in! If the operator allows the program they are criminally liable, so the operator would take a less lenient view of any program, affording themselves full protection. On the other hand, a program in the grey area of

interpretation which is prohibited will create an uproar around censorship so that the operator loses either way.

As to the two programs mentioned in footnote 3. It would not be true to state that sexually explicit programs have never been shown on any access channel. However, CCTV's research has indicated that election related programming have caused far more difficulties than obscene programming. Having seen both of the programs mentioned in their entirety, CCTV would argue that neither is obscene. Of the more than 600 systems owned by Continental, most of them with local programming, only one hour of programming was found to be sexually explicit. In Cambridge less than one hour out of 15,000 hours of programming CCTV has run in the past five year may have been affected by the Act. Multiply that ratio by the thousands of hours of local programming seen every month on cable systems in the country, we end up with a tremendous effort for virtually no programming of this nature. And to be honest, community access channels do not have the viewership of network channels, so that the odds of viewers seeing obscene programming is further minimized.

If there is no significant amount of obscene programming then what is wrong with a few rules. By creating a set of burdensome rules such as insurance bonding of producers, pre-screening of programming, etc. we will all be looking for a needle in a rather large haystack. Clearly, a chilling effect on all types of programs will take place if sufficient road blocks to making programs are erected. Why not take all of the effort necessary to implement these regulations and use the energy to make for more and better programs.

Therefore, CCTV feels that there simply is not a problem which needs to be fixed. We urge the Commission to address the concern of the Congress by creating mechanisms which allow for the free flow of ideas, opinions, and images. The party responsible for the

program should be the owner of the program and not the cable operator or the access entity.

Respectfully submitted,

/s/

Irwin Hipsman
Executive Director
Cambridge Community Television
One Kendall Square B-400
Cambridge, MA 02139
617-225-2500

FCC Caption Omitted

REPLY COMMENTS OF
CINCINNATI COMMUNITY VIDEO, INC.

The recent comments that were filed by the cable industry in this proceeding seem to say that if cable companies are given broad authority to implement the regulations adopted by the FCC in regards to access channel programming, many of the cable companies will exercise this authority as fully as possible, even if the end result is to prevent the use of access channels altogether.

However, this result cannot be fully reconciled with the basic purposes of the Cable Act, one of which is to promote diversity. Therefore, Cincinnati Community Video is urging the FCC to reject any proposal that would allow the cable operator so much authority in banning public access programming. What the FCC must do instead, as urged by the Alliance for Community Media (ACM) and others, is to adopt rules that more carefully and narrowly define the circumstances under which access programs can be banned.

Aside from the constitutional and statutory reasons identified in comments filed by the ACM, there are a number of good reasons why this is so. The first issue is the sheer amount of time it would take to review access programs for content violations.

In our case, citizens and community organizations supplying local programming to four public and educational access channels on the Cincinnati cable systems create over 400 new hours of programming a month. The practicality of setting up a review process in anticipation that there might be an obscenity is not prudent. It is particularly imprudent when consideration is given to the fact that in 10 years of access operations with over 30,000 access programs cablecast not a single obscenity violation has ever occurred.

The second reason is Congress' intention to allow for program diversity. This intention comes to fruition through public access. Public access allows all constituencies to speak, to use the pervasive

medium of television to communicate opinions. Thousands of citizens and non-profit agencies use or have used public access here. From the Better Housing League to the NAACP to the Cincinnati Board of Education, all are using or have used public access television. Any ruling that would delay or otherwise jeopardize the timely delivery of public access programs would inappropriately stifle the diversity of programming which Congress sought to encourage.

Finally, Cincinnati Community Video finds especially unclear Warner Cable's specific comments to the FCC regarding the Cincinnati, Ohio public access channel cablecast of nude sports programming supplied by a nudist organization as an example of local indecency. The area chapter of the American Sunbathers Association did supply a program about nudist lifestyles in March of 1992 which ran no earlier than 12:30 am. There were virtually no complaints from citizens regarding public indecency. There was far more public outcry regarding decency when Warner Cable offered the Playboy channel here. They eventually pulled it from the channel lineup as Warner had problems controlling illegal receipt of the service. Our overall concern is the use of the term "indecent" which Warner applies to this particular access program. We fear it is an example of how they will exercise unlimited rights to censor access programming and, as in this case, develop sweeping generalizations regarding the labeling of program materials as indecent.

There is no reason to allow operators to so interfere with access operations, established and operating by mutual agreement. For reasons stated above, the Commission should reject proposals by the cable industry that cable companies be granted broad authority to censor PEG programming, and adopt proposals made by the Alliance for Community Media.

/s/
Joyce Miller
Executive Director
Cincinnati Community Video, Inc.
3130 Wasson Road
Cincinnati, OH 45209

December 21, 1992

Cover Redacted

REPLY COMMENTS OF THE CITY OF ST. PAUL

Table of Contents Omitted

SUMMARY OF ARGUMENT

Cable operators in many communities have expressly agreed not to exercise any control over facilities provided for public, educational or governmental ("PEG") access use. In St. Paul, Minnesota, for example, the City of St. Paul ("the City") has authority to determine the rules and procedures that will govern use of all access facilities and equipment. The franchised cable operator, Continental Cablevision of St. Paul, Inc. ("Continental"), expressly agreed to this provision. In December 7, 1992 comments to the FCC, however, Continental's parent company (and other cable operators) asked the Commission to determine that such provisions, and related provisions governing indemnification of cable operators, are preempted by Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act").

Agreements regarding control over, and liability for, PEG access facilities should remain fully enforceable. Such agreements are not in any way inconsistent with, or preempted by, the Act. Section 10 of the Act permits, but does not require, cable operators to censor certain types of PEG access program material. Nothing prohibits a cable operator from entering into contracts at the local level (with cities, access centers or producers) that define how and under what circumstances this permissive right may be exercised; indeed, nothing prevents the operator from agreeing that it will not exercise any rights it may have to ban certain types of PEG

programming. The Cable Act fully supports and is consistent with such agreements. For example, it generally requires cable operators to refrain from exercising editorial control over PEG channels (47 U.S.C. § 531(e)) and specifically authorizes franchising authorities and cable operators to enter into agreements "that certain cable services shall not be provided or shall be provided subject to conditions if such cable services are obscene or are otherwise unprotected by the Constitution of the United States." 47 U.S.C. 544(d)(1).

Moreover, an operator's promise not to interfere with rules regarding PEG facilities is often made in exchange for substantial benefits. For the FCC unilaterally to modify carefully negotiated agreements and to invalidate promises made by cable operators would unfairly and unnecessarily harm franchising authorities, cable subscribers and PEG access programmers.

FCC Caption Omitted

REPLY COMMENTS OF THE CITY OF ST. PAUL

I. INTRODUCTION

The City of St. Paul, Minnesota ("the City") issued a 15-year cable franchise to Continental Cablevision of St. Paul, Inc. ("Continental"). According to the franchise, as amended, Continental is obligated to make available for access programming purposes six video channels on its cable system in the City, for public, educational and governmental ("PEG") use.

During the course of the franchise, disputes arose between Continental and the City. The City notified Continental that it was out of compliance with the franchise and, as a result, Continental filed an application to modify the franchise. Shortly thereafter, the City issued a violations notice to Continental. One of the primary issues of dispute pertained to Continental's failure to comply with its obligations with respect to PEG access facilities. On September 15, 1992, the day after the Conference Report on the Cable Television and Consumer Protection Act of 1992 ("the Act") was

issued,[1] and after more than a year of intense negotiations, the City entered into a Settlement Agreement with Continental, whereby the City agreed to rescind its violations notice and Continental agreed to rescind its modification application. Prior to the settlement, Continental had broad obligations to support PEG access and to produce local origination programming. As part of the Settlement Agreement, Continental was relieved of all of its local origination programming production obligations, and its PEG obligations were restructured. While Continental will provide facilities and other specified support, responsibility for local programming obligations (including PEG) will be assumed by the City and/or by a non-profit entity or entities designated by the City (the "Designated Entity"), on a date agreed to by the parties.

As part of the Settlement, the parties agreed to make certain conforming changes to the provisions of the City Code that govern Continental's performance. The City Code, as amended, now provides that the Designated Entity will indemnify Continental for any acts or omissions on the part of the Designated Entity, but the indemnity provision expressly precludes claims for which Continental is immune from liability under 47 U.S.C. 558. In addition, continental agreed that the City would have responsibility for the rules and regulations governing the use of the PEG access facilities, and equipment.

Continental's parent company has submitted comments to the commission, requesting it to clarify that agreements by a cable operator not to exercise control over PEG facilities are preempted by the Act.[2] Similar requests have been made by other operators. The City urges the FCC to reject the pleas made by the cable operators, because agreements governing the manner in which operators exercise control over PEG channels, such as the recent St. Paul agreement, are neither inconsistent with, nor preempted by,

---

[1] H. Rep. 862, 102d Cong., 2d Sess. (1992)

[2] Comments of Continental Cablevision, Inc. to the FCC, "Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992," MM Docket No. 92-258 at 6-8 (filed December 7, 1992) (hereafter "Comments of Continental").

the Act. Moreover, public policy concerns weigh heavily in favor of a determination that such agreements regarding a cable operator's liability for, and control over, PEG access programming are not in any way affected by Section 10 of the Act.

II. THE FCC SHOULD CLARIFY THAT THE ACT DOES NOT PREEMPT ANY AGREEMENTS BETWEEN A CABLE OPERATOR AND A FRANCHISING AUTHORITY REGARDING A CABLE OPERATOR'S LIABILITY FOR, OR CONTROL OVER, PEG ACCESS PROGRAMMING AND FACILITIES.

A. Nothing in the Act Prevents A Cable Operator from Agreeing to Waive Its Right to Censor Certain PEG Access Programming.

Section 10(c) of the Act requires the FCC to promulgate regulations that will *enable* cable operators to prohibit the use of PEG access channels for material that is obscene, sexually explicit or that promotes unlawful conduct. Plainly, the cable operator is at most permitted, but not required, to censor PEG access programming.[3] Not only is a cable operator not required to take any steps to prevent any type of programming on a PEG channel, but the operator will be immune from liability, pursuant to 47 U.S.C. 558, unless the program involves obscene material.[4]

---

[3] The City profoundly disagrees with the unsupported assertion by InterMedia Partners that because cable operators are likely to exercise their rights to censor certain PEG programming, Section 10(c) is somehow mandatory rather than permissive. *See* Comments of InterMedia Partners to the FCC, "Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992," MM Docket No. 92-258 at 2 (filed December 7, 1992) (hereafter "Comments of InterMedia Partners").

[4] Section 10(d) of the Act only eliminates cable operator immunity for obscene programming shown on PEG access channels. Both operators and supporters of access have argued that this provision should be read to impose liability only where an operator knows that a program is obscene; under this approach, in situations where an operator does not manage access, it could have no liability for the programming.

A cable operator may refuse to exercise its power to prohibit certain types of programming material over PEG access channels, as a result of its own, unilateral decision. It follows that an operator may limit or condition any such authority it may have through a negotiated agreement with a franchising authority or any other entity. Continental's attempt to use potential liability as an excuse for voiding its contracts is unsupported by principles of contract law, which allow parties to allocate risks as part of their bargain.

The FCC has indicated that where a right under federal cable law is permissive, existing agreements that restrict use of that right remain in full force and effect. For example, the FCC concluded that franchise agreements requiring cable operators to pay less than the maximum amount of franchise fees permitted by new federal regulations were not affected by regulations allowing franchising authorities to charge more.[5] Likewise, a franchise agreement requiring a cable operator to pay only 3 percent of its gross revenues to the franchising authority is not preempted or otherwise affected by 47 U.S.C. 542(b), which allows a franchising authority to collect up to 5 percent of gross revenues.[6]

In the same way, an agreement by a cable operator not to exercise control over PEG access programming or facilities constitutes a valid contract, whereby an operator waives or conditions exercise of a permissive right. The operator has merely delegated to another entity the responsibility for administrating PEG access. The Act does not preclude an operator from agreeing not to exercise any powers it may have, and thus it does not invalidate

---

[5] "Report and Order: Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships," 66 F.C.C.2d 380, 403 n.24 (1977).

[6] Similarly, other permissive rights may be waived by agreement by the operator or franchising authority. For instance, franchising authorities have not been deemed to be statutorily required to exercise their rights under 47 U.S.C. 531(a) to require cable operators to provide PEG channel capacity.

an existing promise by a cable operator that it will not in any way interfere with PEG access use.

B. Preemption Analysis Does Not Require a Finding that Agreements Regarding A Cable Operator's Liability for or Control Over PEG Access Programming and Facilities are Preempted.

State and local activity is preempted by federal law only where (1) Congress has expressed a clear intent to preempt such activity: (2) Congress has completely occupied the field of regulation and has left no room for state or local activity; or (3) compliance with both federal and state or local law is impossible. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984). Where federal law can exist compatibly and consistently with state or local regulation, however, it is not preempted, and both remain in effect. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (federal regulation should not be deemed preemptive of state regulatory power in the absence of persuasive reasons). "Congressional regulation of one end of the stream of commerce does not, *ipso facto*, oust all state regulation at the other end." *Id.* at 145.

Congress did not in any way preempt the field regarding control over PEG access programming. It did not expressly prohibit franchising authorities and cable operators from reaching agreements with respect to control over PEG programming and facilities. Rather, federal law expressly allows such agreements. *See, e.g.* 47 U.S.C. § 544 (d)(1). Nor does Section 10(d) specifically require the FCC to allow operators to demand indemnities broader than those they may be able to obtain through valid contract negotiation.

Congress did not "occupy the field" of regulation in this area. Rather, a cable operator's right to exercise control over PEG programming is permissive rather than required (and even so is limited to three specifically enumerated types of programming). Further, a cable operator may be liable for PEG programming only

in cases where obscene material in aired, and even that potential liability may be strictly curtailed under FCC rules.[7]

Moreover, there is nothing inconsistent between the Act and state or local agreements that limit a cable operator's control over PEG use. To the contrary, 47 U.S.C. 531(e) specifically prohibits a cable operator from exercising editorial control over PEG channels and 47 U.S.C. § 531(b) allows the franchising authority to specify "rules and procedures for the use" of PEG channels. In amending the federal cable law, Congress chose to retain these provisions. Thus, agreements by cable operators not to exercise control over PEG access programming or facilities are consistent with, and in fact, reaffirm, federal law.

The fact that local or state activity addresses the same objectives as federal law does not necessarily require preemption. *Florida Lime and Avocado Growers*, 373 U.S. at 142. The Supreme Court has recognized, for instance, that a state may adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).[8] Franchise agreements that limit control by and/or liability of cable operators over PEG access facilities are not in any way inconsistent with Section 10 of the Act. Rather, such agreements complement federal cable law. Nothing in the Act requires preemption of franchise or other agreements regarding PEG access facilities.

---

[7] *See e.g.*, Comments of InterMedia Partners at 15-16 (urging FCC to adopt regulations imposing liability on cable operators only when they had actual knowledge that the programming contained obscene material).

[8] *In Pruneyard*, the Supreme Court upheld free speech rights guaranteed by the State Constitution without deciding whether those rights were protected under the First Amendment. Similarly, franchise agreements that preclude a cable operator from exercising control over PEG access programming provide greater freedom of speech than is required by federal law.

C. Public Policy Considerations Require a Determination that Agreements Regarding a Cable Operator's Liability for or Control Over PEG Access Programming and Facilities are not Preempted by the Act.

Continental's parent company has asked the Commission to sweep away all franchise provisions in which a cable operator has agreed to relinquish control over access programming and any provisions that indemnify cable operators for liability with respect to PEG access facilities, to the extent that such indemnity agreements limit a cable operator's control over obscene or indecent programming. Continental's parent company admits that such provisions are included in many franchise agreements.[9]

In essence, the Commission is being asked to substantially alter a significant number of carefully negotiated agreements, and to eliminate part of the consideration provided by cable operators in exchange for obtaining (or retaining) cable franchises. This represents no small sacrifice for franchising authorities, PEG access users, and cable subscribers. The Commission should consider carefully the public policy implications of acceding to the request made by Continental's parent and others.

The agreements that the cable operators ask the FCC to preempt are bargained-for concessions and constitute consideration by the operator. The City of St. Paul, for example, waived its claims to past, unpaid franchise fees, as well as certain other claims, specified in the Settlement Agreement, that the City might have raised against the cable operator, Continental. In exchange, Continental agreed, among other things, that it would not exercise any control over rules and procedures governing PEG facilities and equipment. This promise was a substantial element of the consideration provided by Continental, and constituted an integral and material part of the Settlement Agreement between the City and Continental. Continental's parent appears to be asking the FCC to eliminate part of its end of the bargain in St. Paul and elsewhere.

---

[9] Comments of Continental at 6-7.

There is no need for the FCC to unilaterally change those bilaterally-negotiated agreements, and indeed, it cannot do so fairly, preserving the relative balance between the parties. There is no justification for preempting contracts where, as here, there is no conflicting federal law, and where to do so would deprive communities and cable subscribers nationwide of the benefits of promises made by their local cable operators, without providing any corresponding compensation.

III. CONCLUSION

For the foregoing reasons, the City of St. Paul, Minnesota respectfully requests that the Commission reject cable operator's request that it rule that state and local agreements regarding control over, and liability for, PEG access programming and facilities are preempted.

Letterhead of ACTV 21 Omitted

FCC Caption Omitted

REPLY COMMENTS OF
Columbus Community Cable
Access, Inc. (ACTV 21)

The comments filed by the cable industry in this proceeding indicate that, if cable companies are given broad authority to implement the regulations adopted by the FCC pertaining to programming on access channels, many of them will exercise it broadly, even if the result is to prevent the use of access channels altogether.

Such a result cannot possibly be reconciled with the basic purposes of the Cable Act, which include promoting diversity. As a result, ACTV 21 urges the Commission to reject any proposal that would leave the operator with broad discretion to ban programming on public access channels. Instead, as urged by the Alliance for Community Media and others, the FCC must adopt rules that carefully and narrowly define the circumstances under which access programming can be banned.

There are several good reasons why this is so (aside from the constitutional and statutory reasons identified in the comments filed by the Alliance for Community Media).

Several operators have suggested that, if they are given the broad authority to review PEG access programming for content, the result will be increased expense and delay in cablecasting programming. Many community programmers in Columbus would be denied the opportunity to speak on the public channel in a timely fashion. A few examples are: 1) several local community groups would not have been able to respond to and participate in the

discussion concerning anti-discrimination and zoning laws proposal by the Columbus City Council; 2) the open and frank health discussions about unsafe sex practices by community groups and health organizations could have been squelched; and 3) programs by and for young people about drug abuse which contain "street language" could have been banned.

Some operators have proposed that they be allowed to pre-screen programming at will. A pre-screening rule, or any rule that permitted the operator to exercise advance approval over programming, could make access unaffordable. A significant percentage of the individuals who use the public was channel in Columbus earn less than $15,000.00 per year. Additionally, many community organizations and nonprofits which use the access channel have very small operating budgets. FCC-imposed rules mandating indemnification, certification, bonds or liability insurance will place unnecessary financial obligations onto these individuals and organizations which they will not be able to bear. The FCC must not place discriminatory price tags on the public's right to speak on an electronic public forum.

Some operators have suggested that, if they are given broad authority, they will require access centers themselves to make certifications as to the content of programming. However, access center budgets are often fixed as a result of contracts with operators and/or cities, which specify what the access organization can and cannot do. Allowing operators to impose new obligations on access centers is not required by the amendments to the Cable Act, and would require access centers to take on new tasks without compensation. ACTV contracts with the City of Columbus to provide video training, outreach, promotion, equipment use and program scheduling functions for public access activities on a first-come, first-serve nondiscriminatory basis. ACTV's annual funding comes, in part, from the 3% franchise fees paid to the City by the two local cable operators, Time Warner Entertainment Company, L.P. and Coaxial Communications Inc. ACTV's City funding has not increased in three years while actual services provided have increased by as much as 77.5%. Added and unnecessary financial burdens for insurance, bonds or staff to perform pre-screening of

programs will have a major negative impact on services to the public. There is no reason to allow operators to so interfere with access operations, established and operating by mutual agreement.

Not only would this interfere with speech, the industry has not shown it is necessary to do so. In the course of negotiating the cable franchise, an indemnity clause between the City of Columbus and the cable operators was included in City Code, Chapter 595.08. Also, ACTV's contract with the City also contains an indemnity clause. And another local provision is found in Columbus City Code Section 595.05 (E) which states:

> The operator shall have no control over the content and scheduling of access programs other than the prohibition of: (1) any advertising material designed to promote the sole of commercial products or services including advertising; (2) lottery information; (3) legally obscene matter pursuant to applicable Federal, State, or City law.

ACTV is unaware of any actions taken by the cable operators under Section 595.05(E) within the last 10 years. And it is reasonable to assume that action against "legally obscene matter" could occur only after a court of competent jurisdiction finds certain "matter" to be "legally obscene." Additionally, Columbus City Code, Section 595.11(I) also requires the cable operators to provide "adequate technical means" to prevent reception by subscribers for the type of programming described in the FCC's proposed rules.

There is no reason to replace these agreements (or agreements where the operator has chosen to do without an indemnity) with a national standard, which may present serious legal questions.

For reasons stated above, the Commission should reject proposals by the cable industry that cable companies be granted broad authority to censor PEG programming, and adopt proposals made by the Alliance for Community Media.

/s/
Carl Kucharski
Columbus Community Cable Access, Inc. (ACTV 21)
394 Oak Street
Columbus, OH 43215

December 21, 1992

FCC Caption Omitted

**REPLY COMMENTS OF
DENVER AREA EDUCATIONAL
TELECOMMUNICATIONS CONSORTIUM, INC.
ON NOTICE OF PROPOSED RULE MAKING**

Denver Area Educational Telecommunications Consortium, Inc. ("DAETC")[1] hereby submits the following reply comments in the above-captioned proceedings.

Cable Operator Discretion and Indemnification

In their comments, certain cable operators have asked that the Commission grant them undue latitude in implementing Section 10 of the Cable Consumer Protection and Competition Act of 1992 ("1992 Act").

For instance, comments submitted by Cole, Raywid & Braverman ("Cole Raywid") on behalf of certain cable companies (Acton Corp., *et al*) asked the Commission to rely extensively on operator "judgment" in prohibiting indecent material on leased access channels. Cole Raywid asks the Commission to foreclose damages for operators' "good faith refusal" to carry offensive programming.[2] As well, Cole Raywid seeks to place cable operator decisions beyond the bounds of Commission or court review.[3]

Far from implementing Section 10 of the 1992 Act in the narrowest possible fashion, these proposals would assign broad

---

[1] As set forth in its Comments in this proceeding, DAETC is a non-profit corporation that programs leased access cable channels. DAETC's program service, known as The 90's Channel, appears 24 hours a day on eight cable systems serving over 500,000 subscribers.

[2] Acton Corp. *et al* at 2, 5.

[3] *Id*. at 4.

powers of censorship to private entities which have shown systemic hostility to leased access in general,[4] and insulate such entities, decisions from impartial review under law. Contrary to Cole Raywid's suggestion, the Commission must concern itself with the question of whether the content of barred programming is genuinely impermissible, rather than whether a cable operator has complied with a nebulous "good faith" standard.

DAETC strongly recommends that the Commission rule that operator decisions regarding the withholding of programming under Section 10 of the 1992 Act are subject to Commission review, and, through appeal, judicial review. We exhort the Commission not to protect operators from civil liability they incur as a result of refusing to transmit programming that is not legally prohibited. Clearly, to do otherwise is to eliminate risks in censoring programming, while leaving potential danger in transmission. It is not difficult to foresee that such incentives will favor censorship over expression.

Further, to adopt the proposals urged by Cole Raywid and certain other cable commentators is to undermine the principal intent of Congress in passing Section 612 of the Communications Act. As pointed out by The Alliance for Community Media, *et al*, the original and continuing purpose of Congress in Sections 611 and 612 of the Communications Act is to establish channels of speech which are beyond operator control[5] — a goal which directly contradicts Cole Raywid's proposals to give operators unbridled discretion over content.

Cost of Implementing Section 10 of the 1992 Act

Certain cable operators have asked that parties other than cable operators bear the expense of cable company implementation of Section 10 of the 1992 Act.[6] DAETC has searched the statute and

---

[4] See comments of DAETC at 4, 5.

[5] Comments of the Alliance for Community Media, *et al*, at p. 3.

[6] See Comments of Continental Cablevision at p. ii and those of Intermedia Partners at p. iii.

legislative history in vain for any suggestion that others should bear the financial burden of implementation. As a non-profit entity with a limited budget, DAETC could well be forced out of business if required to pay for all or part of the implementation of Section 10 by a cable operator.[7] DAETC believes that given that the purpose of Section 612 is to expand the roster of speakers on cable television, it is not in the public interest to impose potentially fatal financial burdens on small leased access programmers.

Constitutionality of the Statute

An expressed in DAETC's comments in this rule making, DAETC believes the indecency provisions of Section 612 of the 1992 Act are unconstitutional. We note with some satisfaction that a broad spectrum of other commenters have expressed similar views. Nonetheless, DAETC acknowledges that the commission must proceed with this rule making until the statute is stayed or overturned.

Respectfully submitted,

DENVER AREA EDUCATIONAL
TELECOMMUNICATIONS CONSORTIUM, INC.

By: /s/
John B. Schwartz, President
P.O. Box 6060
Boulder, CO. 80306
(303) 442-2707

Dated: December 18, 1992

---

[7] The irony here is that if the Commission adopts the suggestions of the more extreme cable commentators, DAETC and other leased access providers could end up paying the cost of private censorship of programming which Congress did not intend to prohibit.

FCC Caption Omitted

REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

The Motion Picture Association of America, Inc. ("MPAA") respectfully submits its reply to comments filed in the above-referenced proceeding.

MPAA represents seven leading U.S. producers of motion picture and television programming. As program providers, MPAA's members are potential users of leased access facilities, directly or indirectly.

In the instant proceeding, the Commission proposes to adopt regulations dealing with, *inter alia*, restricting access by children to "indecent programming" on leased access channels of cable systems, as mandated by Congress in the Cable Consumer Protection and Competition Act of 1992 ("1992 Act"). We confine these reply comments to that portion of the proceeding.

We begin by declaring our agreement with the nearly universal view of the commenting parties that the entire censorial regime imposed by Section 10 of the 1992 Act and to be implemented in this proceeding is unconstitutional. The unobjectionable goal of protecting the child audience from exposure to unsuitable materials simply canno justify these new highly intrusive and speech-restrictive provisions. Children are already protected under federal and state obscenity laws under "harmful to minors" provisions.[1]

---

[1] The exhibition of material, including any program delivered on a cable television system, *to a minor* may be proscribed only if it is "harmful to minors," which requires a finding that the program depicts nudity, sexual contact, sexual excitement, or sadomasochistic abuse *in a manner which* "predominantly appeals to the prurient, morbid, or shameful interests of minors, which is patently offensive to prevailing standards in the adult

(continued...)

Additionally, children in households with cable television have been protected for years by the federal requirement that lockboxes be provided to subscribers upon request.[2]

Pending the inevitable court challenges that the operation of Section 10 will generate, the Commission must take every step necessary to minimize the harm that the statute and new regulations will cause to the dissemination of First Amendment-protected speech. The Commission must provide to cable operator/lessors and to programmer/lessees the greatest possible clarity and certainty in the implementation of the requirements of Section 10. While the Commission cannot cure the overbreadth of the statute through interpretation, it must at least seek to mitigate the harm.

Furthermore, the Commission must interpret the requirements of this section in a manner not inconsistent with Congress' other expressed intention: to promote a diversity of viewpoints through leased access.[3] Congress has again expressed its commitment to leased access through requirements in Section 9 of the 1992 Act that are intended to encourage leased access use. By promoting

---

[1](...continued)
community concerning what is suitable for minors and which is utterly without redeeming social importance for minors." *Ginsberg v. New York*, 390 U.S. 629 (1968).

Regulations pertaining to restricting an adult's access to material delivered via cable television face similar constitutional scrutiny: that materials can only be prohibited "if taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value. . ." *Miller v. California*, 413 U.S. 15, 21 (1973). The more recent U.S. Supreme court ruling in *Pope v. Illinois*, 481 U.S. 497 (1987), affirmed the *Miller* test, specifying that the proper inquiry in an obscenity prosecution is whether a "reasonable person," as opposed to the "community," would find that the material possesses serious value.

[2] 47 U.S.C. Sec. 544(d)(2)(A).

[3] The First Amendment rationale for leased access is summarized in the comments of the Alliance for Community Media et al. at 3 ff.

unwarranted censorship or self-censorship, or by burdening leased access users with unjustified costs or potential liability, these new rules could have the effect of chilling the use of leased access channels, which is plainly unconstitutional.[4] It would be unfortunate indeed were the Commission to interpret its obligations in a way that discourages the freedom of expression that leased access was intended to foster, and precipitates a constitutional challenge.

I. Definition of "Indecent Programming"

In attempting to define "indecency," the Commission is once again confronted with an extraordinarily difficult, delicate and ultimately futile challenge. Recent controversies over alleged "indecent" broadcast programming suggest the grave dangers inherent in attempting to regulate constitutionally-protected speech, and show the need for great clarity and certainty in any regulations adopted by the Commission. The potential financial liabilities, harm to reputation, and harm to First Amendment interests that could flow from violations of such regulations are extremely serious.

These considerations compel the adoption of a narrow, uniform and workable definition of "indecent programming" which should govern both in the context of (i) any "voluntary policy" on non-carriage of "indecent programming" that a cable operator may choose to adopt and (ii) what programming a cable operator who does not elect to bar "indecent programming" must relegate to "blocked" channels. The importance of uniformity is recognized by the National Cable Television Association ("NCTA"), which urges that the definition of "indecency" governing what a cable operator may choose to prohibit and the definition for purposes of

---

[4] The Supreme Court has ruled many times that laws that, by creating the fear of legal consequences, promote self-censorship violate the First Amendment as much as laws that directly ban certain speech. See *Smith v. California*, 361 U.S. 147, 154 (1959).

determining what programming may be relegated to a "blocked" channel "should be the same."[5]

We concur with the view of Time Warner Entertainment Company, L.P. ("TWE") that the definition should incorporate a community standard "for the cable medium," that "the [appropriate] standard is that of the 'average cable viewer' on a nationwide basis. . .", and that the determination of whether any content is "patently offensive" requires judgment "within the context of the whole program and the merit of the work."[6]

Any definition of "indecent programming" must also recognize the distinct technological and commercial differences between cable television and other electronic media. Cable is neither so ubiquitous, readily accessible or intrusive as the broadcasting or telephone media. Moreover, as noted above, the cable industry is already under an obligation to provide "lockboxes" to parents upon request. In view of these and other factors, we believe a narrower definition of "indecency" than is applied to those media can be fully justified.

Any adjudicatory body attempting to apply this definition must also consider how the content in question compares with other content on non-leased access channels. Any new regulations must crate a presumption that any program material of a kind or type similar or identical to that which might appear on a non-leased access channel, and which would not be found "indecent," should not be deemed "indecent" for purposes of the leased access

---

[5] NCTA at 7. We note the valuable role that NCTA has played in promoting the adoption of voluntary uniform industry standards in such areas as customer service, and believe such an effort would be appropriate in this context. The cable industry should be encouraged to adopt consistent industry-wide policies as to *both* certification requirements *and* voluntary exclusion of "indecent programming" in order to give fair notice to those who would use leased access facilities and to avoid a content-based balkanization that could render leased access useless for those seeking a national or regional audience.

[6] TWE at 6-8.

regulations. Absent such a standard, one must presume that the Congress has chosen to discriminate against leased access programming based on the identity of the programmer, not based on the alleged injurious nature of the program content for a child audience, which would only compound the constitutional infirmity of the new rules.

Finally, the Commission must "clarify that all state and local franchise authority regulations, as well as specific franchise agreement provisions, that are inconsistent with the Act and the implementing regulations are preempted."[7]

In summary, the Commission must adopt a national standard of indecency, must ensure that the definition is narrow, workable and non-restrictive of permissible speech as possible, and must preempt state and local regulation of content based on the same or similar concerns about the child audience. The Commission should also encourage the cable industry to promote uniformity in application of these standards. While a definition incorporating these elements would not necessarily pass constitutional muster, it would at least be somewhat more consistent with Supreme Court standards than that proposed in the Notice of Proposed Rulemaking.

II. The "Single Channel" Requirement

In the instant proceeding, the Commission must interpret what Congress meant when it gave the cable operator the option of putting "indecent" programming on a "single channel. We support the argument by Time Warner Entertainment Company, L.P., that

> Congress' clear intention in passing this provision was to limit children's access to indecent programming, and not necessarily to limit the amount of indecent programming to that which may fit on one channel. The Commission, therefore, should make clear that cable operators may, if they choose, place indecent commercial use programming

---

[7] Continental Cablevision at 6.

on more than one channel as long as any channel that is designated for indecent programming is blocked.[8]

Even if the Commission were not persuaded by that rationale, there are technological developments which may require a more expansive view. Many cable operators are now on the verge of introducing signal compression technologies which could increase the video carriage capacity of a standard 6 MHz channel by anywhere from four to ten times. As such technologies are introduced, the Commission should give the cable operator greater latitude in satisfying the spirit of the statute. Thus, even if the Commission determines that by "single channel" Congress meant a single 6 MHz block of spectrum, the Commission should presume that the cable operator who confines "indecent" programming to such multiple compressed channels (i.e., the several video channels compressed within the space of the single 6 MHz channel), where each of the compressed channels is otherwise subject to blocking, is operating within the intent of the statute.

III. Notice and Indemnification Requirements

We begin by reiterating our strenuous opposition on constitutional grounds to the entire censorship scheme imposed by Section 10 of the 1992 Act. Regulations requiring a First Amendment-protected speaker to self-censor or that impose, directly or indirectly, substantial potential liabilities for such protected speech constitute a direct prior restraint. However, for the purpose of assisting the Commission to mitigate the First Amendment harms of Section 10, we offer the following comments.

Each cable operator should have in place within a reasonable period of time its voluntary policy on the carriage of "indecent programming," and its compliance plan for carriage of such programming on "blocked" channels. We believe an acceptable time period would range from 120-180 days from the effective date of the new regulations.

---

[8] TWE at 9.

Once the operator has taken the technical and other steps to accommodate requests for access to such a channel, the lessee should face no further delay. If the absolute right of a cable operator to voluntary bar all "indecent programming" from its system is indeed constitutional, and if an operator chooses not to exercise this right, it should be prepared to carry any non-obscene programming on its "blocked" channels on very limited notice. The seven days' notice proposed by the Commission should be an absolute maximum. Lessees should also be permitted to provide "blanket notification" for multiple or regularly-scheduled programs.

The cable operator should be given a reasonable period of time to satisfy subscriber requests for blocking of service. However, the time for satisfying such requests should have no bearing on the availability of the leased access channel to the lessee. If an operator wishes to ensure that subscribers are given satisfactory notice of their right to block certain channels, the operator can provide notice to existing subscribers during the 120-180 day implementation period described above, or to new subscribers at the time of sign-up.

To further mitigate the effects of unconstitutional self-censorship, the Commission must take additional steps.

First, a lessee should be permitted, but should not be required, to provide written notice to the cable operator of any programming which the lessee believes may be found to be "indecent."[9] Requiring that such certification be in writing would amount to a Fifth Amendment violation.[10]

---

[9] In the event that written notice is provided, the time period for record retention should not be more than 30 days from date of carriage, and the time period within which a complaint may be filed against an operator or programmer should be no longer than the record retention period.

[10] We do not here address questions of certification of, or liability for, carriage of "obscene" programming because the MPAA member companies neither produce nor distribute programming that would violate any constitutionally valid definition of "obscenity."

Second, the Commission can better satisfy the purposes of the Act while reducing the damage to constitutional rights by permitting any lessee simply to request carriage on a "blocked" channel of *any* program.[11]

The cable operator has the absolute right not to carry *any* "indecent programming" on its leased access channels and, in adopting such a policy, will in fact bear editorial responsibility for its decision to exclude. If the cable operator waives that right, the operator must then ensure, based on information received from the lessee, that any "indecent" leased access programming is regulated to a "blocked" channel. This can be achieved *without* requiring the lessee to "certify" that programming is "indecent" — which will likely prove an impossible task — by simply allowing any lessee to request carriage on a "blocked" channel of any programming whatsoever.

The cable operator can alleviate any remaining risk by requiring indemnification from *all* lessees against any liability flowing from the transmission of obscene or indecent programming, or permitting lessors and lessees to determine by contract who may bear certain specific costs of compliance with Section 10. The Commission must ensure that such requirements are not unreasonable and do not exist for the primary purpose of discouraging legitimate use of leased access channels. The Commission must also take any such requirements fully into account in establishing terms and conditions for leased access use, under regulations to be adopted pursuant to Section 9 of the 1992 Act.

Any disputes between lessors and lessees as to the requirements of these new regulations should be subject to expedited review by the Commission.

Finally, we support the position of cable industry commenters that cable operators should "retain the flexibility to use any

---

[11] We believe that such an approach is as consistent with the requirements of the statute as the recommendation by Time Warner Entertainment (and discussed above) that the Commission interpret the "single channel" requirement more broadly.

reasonable method of blocking subscriber access that satisfies the goals of Section 10," including partial blocking of mixed-use channels.[12]

IV. Sufficiency of Notice of Proposed Rules

The record in this rulemaking demands that the Commission move with great caution in adopting rules which will impact First Amendment-protected speech. Due to the extraordinary constitutional delicacy of the issues at hand, and despite the tight statutory timeline imposed on the agency, the Commission cannot conclude the instant proceeding without subjecting a final set of proposed rules, and its constitutional analysis underlying such rules, to an additional round of public comment. Respect for the First Amendment demands no less.

Respectfully submitted,

MOTION PICTURE ASSOCIATION
OF AMERICA, INC.

By: /s/

Fritz E. Attaway
1600 Eye Street, N.W.
Washington, D.C. 20006
Telephone: (202) 293-1966

Of Counsel:

Joseph W. Waz, Jr.
Senior Vice President and General Counsel
The Wexler Group
1317 F Street, N.W.
Washington, D.C. 20004
Telephone: (202) 638-2121

DATED: December 21, 1992

---

[12] See, *e.g.*, Tele-Communications, Inc. at 12 ff.

Caption Omitted

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES.

The National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties (collectively, "Local Governments") submit these reply comments in the above-captioned proceeding.

I. INTRODUCTION

The Federal Communications Commission ("Commission") has proposed a reasonable method of implementing Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). In general, the rules strike an appropriate balance between Congress' desire that cable operators be permitted to limit certain programming on access channels, and provisions in the Cable Communications Policy Act of 1984 ("1984 Cable Act") that prohibit cable operators from exercising editorial control over public, educational and governmental ("PEG") access and leased access channels. *See* 47 U.S.C. 531(e) and 532(c)(2).

Local Governments recommended in their initial comments, however, that the Commission take into account the unique role of PEG channels in permitting members of the public and others to provide important programming in the public interest and encouraging the free flow of information among all segments of the community. In particular, Local Governments recommended that the Commission allow PEG providers to: (1) make blanket, rather than program-by-program, certifications; and (2) certify that they have exercised reasonable efforts to ensure that their programs will not contain obscene or otherwise proscribed material. Finally, Local Governments recommended that disputes between cable

operators and programmers be resolved in the first instance by the judicial system.

Local Governments urge the Commission not to adopt proposals by commenters that would upset the careful balance between the 1984 and 1992 Cable Acts, and would increase the administrative and financial burdens on local governments, subscribers and PEG and leased access programmers. In particular, Local Governments urge the Commission not to adopt proposals that would. (1) grant cable operators editorial control over the content of PEG and leased access programming; (2) impose the cost of complying with the Commission's rules on programmers or subscribers; (3) unduly burden members of the public and others that desire to distribute programming over access channels; and (4) restrict the ability of local governments to regulate the programming on PEG channels, and regulate obscene or indecent programming.

II. DISCUSSION

A. Cable Operators Should Bear the Costs of Complying with Section 10 of the 1992 Cable Act

Cable operators should bear the costs of complying with Section 10 of the 1992 Cable Act. Nothing in Section 10 suggests that such costs should be passed directly on to cable subscribers, or imposed on leased or PEG access users or subscribers.[1]

The 1984 and 1992 Cable Acts impose a number of obligations on cable operators, including customer service standards, technical standards, equal employment opportunity reporting requirements, and other requirements. Nothing in these provisions suggests that a cable operator should be able to directly pass on compliance costs to cable subscribers. Section 623 of the 1992 Cable Act identifies the categories of costs that must be included in establishing rates; the cost of complying with Section 10 is not identified as a recoverable cost.

---

[1] *See, e.g.*, Comments of Tele-Communications Inc. at 5, Cox Cable Communications at 10-11, Continental Cablevision, Inc. at 10-11, and the Community Antenna Television Association, Inc. at 7.

The absence of language in the 1992 Cable Act permitting a cable operator to "pass through" compliance costs onto programmers or subscribers makes clear that Congress intended for a cable operator to bear such costs, just as it must bear the costs of complying with other provisions in the 1984 and 1992 Cable Acts.

B. Cable Operators Are Prohibited from Pre-Screening Programming

The Commission should not adopt regulations allowing cable operators to pre-screen or monitor the content of access programming to determine if it is indecent or obscene.[2] The 1984 Cable Act explicitly prohibits cable operators from pre-screening or monitoring programming to ensure that it does not contain such material. *See* 47 U.S.C. 531 ("a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section"); 47 U.S.C. 532 ("a cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming"). Moreover, pre-screening by cable operators pursuant to regulations established by the Commission would have serious first amendment implications.

The certification process proposed by the Commission, along with immunizing a cable operator from penalties the Commission might impose for violations of its rules, should provide cable operators sufficient assurance that prohibited programming will not be carried on their cable systems and that, if such programming is inadvertently carried, the Commission will not penalize cable operators that in "good faith" complied with the Commission's regulations.

---

[2] *See, e.g.*, Comments of the National Cable Television Association at 9.

C. The Commission Does Not Have the Authority to Preempt Local laws and Franchise Agreements

The Commission should not preempt state and local obscenity and indecency laws, franchise provisions, and provisions in contracts between cable operators and public access organizations that are "inconsistent" with the Commission's rules or address the same issues addressed by the Commission's rules.[3]

Congress did not grant the Commission the authority to preempt state and local laws, and franchise and contract provisions, in this area and there is no language in the 1992 Cable Act's legislative history to suggest that this was Congress' intent. Congress could have included a preemption provision in the 1992 Cable Act if Congress had intended for the Commission to preempt state and local regulation in this area. In the absence of such language in the 1992 Cable Act, the Commission should not interfere with the operation of state and local laws and bargained-for franchise and contract provisions. Questions regarding whether a state or local law or franchise provision is preempted by federal law will more appropriately be decided by a court on a case-by-case basis.

D. Local Governments and Programmers Should Not Be Required to Provide Indemnification to Cable Operators

The Commission should not require local governments and cable programmers to provide indemnification, indemnification insurance, a bond, letter of credit or similar protection, to cable operators as a condition of carriage on access channels.[4] Moreover, local governments should not be required to indemnify cable operators for lawsuits challenging a cable operator's decision

---

[3] *See, e.g.*, Comments of Continental Cablevision, Inc. at 6-8, the National Cable Television Association at 12, and Time Warner Entertainment Company, L.P. at 28.

[4] *See, e.g.*, Comments of Blade Communications, Inc., *et. al.* at 12, the National Cable Television Association at 15 and Time Warner Entertainment Company, L.P. at 19 and 23.

not to carry programming that a local government deemed obscene or indecent.[5]

The imposition of an indemnification requirement on local governments would undercut the purpose of — and may violate — the damages immunity provision in Section 24 of the 1992 Cable Act. Section 24 demonstrates Congress' intent to grant local governments immunity from monetary damages, costs and attorneys fees in legal challenges to their authority to regulate cable systems. The Commission should not allow cable operators to recover such damages, costs and fees indirectly by imposing on local governments an indemnification requirement.

Moreover, the 1992 Cable Act does not authorize the Commission to impose an indemnification requirement on either local governments or access programmers. In addition, an indemnification requirement would be inconsistent with state constitutions and statutes that prohibit the imposition of open-ended indemnification requirements on local governments. *See, e.g.*, 31 U.S.C. 1341 (limits indemnification obligations of the federal government and the District of Columbia).

Finally, indemnification requirements would have a "chilling effect" on the number of programmers that could use PEG or leased access channels, and on the regulation of such channels by local governments. Congress enacted leased and PEG access channel provisions in 1984 to promote its goal of "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. 521(4). Congress reaffirmed this purpose in the 1992 Cable Act by: (1) authorizing franchising authorities to deny a franchise request if an applicant does not plan to provide "adequate" PEG channels, facilities or support, 47 U.S.C. 541(a) (as amended by the 1992 Cable Act); and (2) requiring the Commission to establish reasonable rates, terms and conditions of leased access. 47 U.S.C. 532 (c) (as amended by the 1992 Cable

---

[5] *See, e.g.*, Comments of Time Warner Entertainment Company, L.P. at 27.

Act). The Commission would undermine these Congressional policies and mandates if it enacted regulations that would unduly inhibit a programmer's use of such channels. Such a requirement may not be a "reasonable" obligation to impose on programmers, *see, e.g.*, 47 U.S.C. 532(c)(2)(ii) (as amended by the 1992 Cable Act) — particularly on users of PEG channels who may not have the resources to provide indemnification to a private cable operator.

E. Courts Should Resolve Disputes Between Cable Operators and Programmers

Several commenters suggested that either the Commission[6] or local governments[7] resolve disputes between cable operators and programmers. Others have suggested that a cable operator's decision on whether a program should be carried should be final and not subject to review.[8]

Local Governments oppose suggestions that a cable operator's actions not be reviewable. However, Local Governments believe that neither the Commission nor a local government should resolve such disputes. As stated in our initial comments, Local Governments believe that such disputes should be resolved by the courts, which ultimately must decide the constitutional issues that Section 10 may raise. Dispute resolution by either the Commission or local governments would merely delay a decision by a court on these important issues.

III. CONCLUSION

Local Governments believe that the Commission's approach is sound with respect to implementing Section 10 of the 1992 Act. The Commission should not implement suggestions by commenters that would undermine this approach. In particular, Local Governments urge the Commission not to adopt regulations that: (1) grant cable operators the authority to pre-screen access

---

[6] *See, e.g.*,Comments of Cox Cable Communications at 12.

[7] *See, e.g.*, Comments of Time Warner Entertainment Company, L.P. at 24-25.

[8] *See, e.g.*, Comments of Tele-Communications Inc. at 18.

programming; (2) impose the cost of complying with the Commission's rules on programmers or subscribers; (3) impose undue burdens on programmers; and (4) restrict the ability of local governments to regulate PEG channels and enforce laws and franchise provisions regulating indecent or obscene programming. Moreover, Local Governments believe that disputes between cable operators and programmers should be resolved in the first instance by the judicial system.

Respectfully submitted,

/s/

Norman M. Sinel
Stephanie M. Phillipps
William E. Cook, Jr.
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for the Local Governments

December 21, 1992

Cover Omitted

Table of Contents Omitted

FCC Caption Omitted

REPLY COMMENTS
OF THE NATIONAL CABLE TELEVISION ASSOCIATION

* * *

As NCTA pointed out in its initial comments, these changes to existing law only serve to highlight the First Amendment problems that are inherent in the Act's public and leased access provisions. To require cable operators to carry material — indecent or otherwise — that they might otherwise choose not to carry fundamentally interferes with the protected exercise of editorial discretion. But granting cable operators discretion to prohibit only certain types of programming that the *government* views as "indecent" or unfit for carriage raises First Amendment problems, too. To single out some non-obscene programming as "indecent" and therefore subject to discriminatory treatment is to engage in constitutionally suspect content regulation. The law continues to burden cable operators with restrictions on their editorial discretion, but now it also imposes a form of content regulation on providers of access programming.

A number of commenting parties, primarily representing access programmers, are quite sensitive to the First Amendment implications of governmental efforts to restrict "indecent" programming on cable television. But these parties are, at the same

time, wholly oblivious to the First Amendment implications of *forcing* cable operators to carry such programming. Their solution — forcing cable operators to carry such programming, but also forcing them to provide all subscribers who do not want to watch such programming with lockboxes or other blocking devices — only exacerbates the unconstitutional burdens of access requirements.

* * *

Respectfully submitted,

NATIONAL CABLE TELEVISION ASSOCIATION, INC.

By _____/s/_____
Daniel L. Brenner
Michael S. Schooler
Diane B. Burstein

ITS ATTORNEYS
1724 Massachusetts Ave., NW
Washington, DC 20036
(202) 775-3664

December 21, 1992

FCC Caption Omitted

REPLY COMMENTS OF
'Ōlelo: The Corporation for Community Television

'Ōlelo: The Corporation for Community Television ('Ōlelo), urges the Commission to reconsider the proposed rules for regulating programming content on access channels. It is clear from previous actions, current court challenges and the comments filed by the cable industry, that the concept of creating open public access channels has been under constant challenge by the cable industry. The dominant argument posed by the cable operators is that they should not have to carry speech that they cannot control as their own speech. That the cable operator is a first amendment speaker and such obligations should be considered unconstitutional.

If cable companies are given broad authority to implement the regulations proposed by the FCC pertaining to programming access channels, many of them will exercise that authority with such broad impact as to include preventing protected speech and potentially eliminate open access channels altogether.

Clearly this was not the intent of the act. Instead, consistent with the comments by the Alliance for Community Media and others, the FCC should adopt rules that carefully and narrowly define the circumstances under which access programming can be banned.

There are several good reasons why these rules should be reconsidered aside from the constitutional and statutory reasons identified in the comments filed by the Alliance for Community Media.

In Hawai'i, State policy was established that the responsibility for all public access programming was the speaker and not the cable operator nor non-profit access programming facilitator. This policy was created in law indemnifying the non-profit operator from speech that was carried on the access channels. The speaker certifies that their program will not contain any illegal speech. This

policy and procedure has worked well for Hawai'i and relies upon existing laws to prosecute those who place unprotected speech onto the public access channels. There is no compelling reason for the FCC to intervene in the State policy and contractual agreement established between the State and the cable operator and the State and 'Ōlelo.

In cases were cable subscribers have objected to access programming being available in the home, our cable operators have provided lock boxes or filtering devices that remove any undesired channels, whether they are access or partially scrambled pay services such as Playboy. Again, this approach has worked without imposing the burdens of regulations that would chill speech such as pre-screening.

Pre-screening of programming, whether by the cable operator or the non-profit facilitator would pose a significant cost and logistical burden. Highly competent staff with sound legal judgement would have to be hired to review each program requiring long lead times for submission of tapes. This would eliminate any live interactive programming and any programming that would be of a timely nature. This would mean for us, the elimination of educational distant learning programming that must be carried live for student interaction.

In summary, the proposed rules must be reconsidered. The Commission should reject proposals whereby the cable operator is granted broad authority to censor PEG programming. We urge the Commission to consider and adopt the proposals made by the Alliance for Community Media.

/s/
Richard D. Turner,
Executive Director

'Ōlelo: The Corporation for Community Television
960 Māpunapuna Street, 2nd Floor
Honolulu, HI 96819

December 18, 1992

FCC Caption Omitted

REPLY COMMENTS OF VIACOM INTERNATIONAL INC.

Viacom International Inc. (hereinafter "Viacom") by its attorneys, hereby submits its Reply Comments in response to the above-captioned Notice of Proposed Rulemaking. Viacom owns and operates cable television systems and, accordingly, will be directly affected by the outcome of this proceeding.

Viacom shares the concerns of many parties filing comments as to the serious First Amendment problems raised by the statutory provisions giving rise to this proceeding and the unavoidable practical difficulties that any implementing regulations must address. The purpose of this reply is to support approaches suggested by other comments that would minimize burdens and allocate responsibility for compliance in as fair and workable manner as possible given the fundamental flaws of the statutory requirements. Specifically, Viacom supports a system of certification as the starting point of the cable operator's response to requests for channel time by either commercial channel lessees or PEG access programmers. In addition, Viacom believes that prior to airing an access program, the operator must have the right to be indemnified by the programmer against liability stemming from airing programming on the access channels.

Legal and Practical Problems of Section 624(i) of the Cable Act

Viacom agrees with the many commenting parties who have pointed out constitutional flaws and severe practical problems in the mechanism Congress chose to restrict children's access to indecent programming and to keep obscenity off of cable channels. The new statutory provisions are a travesty for everyone involved in access. The rules mandated by the statute will subject cable operators to responsibility and liability for the content of programming over which they otherwise are intended to have no editorial control. Furthermore, however the Commission implements the law, it will

be almost impossible to avoid interfering with legitimate First Amendment rights of programmers who utilize the access channels.

Congress and the Commission already have provided sufficient protection for children by mandating availability of parental control devices. *See* 47 U.S.C. § 544(d)(2)(A) and 47 C.F.R. § 76.11. Letting parents decide what their children should watch and giving them the technical means to implement those decisions certainly seems a more effective and constitutionally less restrictive way to achieve Congress' objective than involving cable operators and programmers in an extremely burdensome if not impossible task.

Recognizing, however, that Congress has mandated further Commission action, Viacom offers the following suggestions, which are intended to minimize the potential burdens of compliance.

Viacom's Recommendations

1. Standard for Indecent or Obscene Material. Viacom believes that given the unique characteristics of the cable medium, the only fair and workable test of "contemporary community standards" for obscenity or indecency must be based on the relevant "community" of cable subscribers. Because viewers must take the action of subscribing to cable service in order to view its programming, it is neither relevant nor appropriate to base the determination of whether material is legally indecent or obscene on the standards of individuals who are not subscribers to the service. As other comments have suggested, a single national standard is both appropriate and effective.

2. Prior Certification and Response: Like many of the commenting parties, Viacom believes that the decision of how to handle potentially indecent or obscene material in both leased and PEG access programming should start with certification. Programmers seeking to use access channels should be required to certify, in writing and in advance, whether the programming *does* or *does not* contain indecent or obscene material.[1] It would not be

---

[1] In the case of PEG access where an intermediate entity such as a nonprofit access group or governmental entity runs the channel(s), that (continued...)

unduly burdensome to place this responsibility on the programmer, which, in fact, is in a better position to know the content. The Commission has relied on programmer certification in other contexts for this very reason. (*See, e.g.*, 47 C.F.R. § 76.225, *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111, *clarified on recon.*, 6 FCC Rcd 5093, 5697-98 (1991).

(a) If a leased access programmer refuses to execute the certificate, the operator has no choice but to treat the programs as if they contain indecent or obscene material.[2] Accordingly, the programmer would be justified in keeping the programming off the system altogether. Moreover, the potential presence of obscene material and the penalties for distribution of such material in Sections 558 and 559 of the Act should be deemed grounds for keeping the programming off whenever confronted with a programmer's refusal to certify.

(b) If a leased access programmer certifies that the programming *does* contain *indecent* material, the operator either may keep it off the system pursuant to a written published policy or may place the programming on a sequestered, blocked channel to the extent that sufficient channel space is available[3]. If, on the other hand, the programmer certifies that the programming does contain *obscene* material, the cable operator may keep the programming off the system.

---

[1](...continued)
group should be required to certify to the operator and, in turn, also would have the right to obtain certification from channel users.

[2] Cable operators should be entitled to rely on certification and should not be required to prescreen all access programming, because doing otherwise would entail great burden and expense, which, for PEG, could be reflected in higher basic subscriber rates; however, operators should not be prohibited from prescreening if they choose.

[3] Viacom believes that operators be required to block no more than one of the channels designated for leased access for the purpose of distributing access programming pursuant to this provision.

(c) If a leased access programmer certifies that the programming *does not* contain indecent or obscene material, the cable operator may deal with the channel request in its usual manner, with the result that such program could be aired on the system on a regular, unblocked leased channel. Of course, if the operator has independent grounds for believing that the programming contains indecent or obscene material notwithstanding the certification (for example, through voluntary prescreening, should the operator in its sole discretion elect to do so), the operator should be able to sequester the channel, or if only an isolated instance of indecent material, to block its transmission if sequestering is impractical. Again, however, the operator would not be in violation for relying on a false or inaccurate certificate in accordance with its normal procedures, because there is no *obligation* to prescreen.

(d) A similar approach should be followed for PEG access. Programmers seeking to use PEG channels should be required to certify, in writing and in advance, that their programming *does* or *does not* contain material of the sort prohibited by Section 532(c) of the Act. As in the case of leased access, when confronted with a request for PEG channel use, the operator's response depends on whether the programmer certifies that the programming *does* contain prohibited material; certifies that the programming *does not* contain prohibited material or refuses to certify.

3. Indemnification: Because the operator could be subject to serious liability in the event of an inaccurate or false certification, it is only fair that cable operators have the right to request indemnification from both leased channel and PEG programmers as part of the certification or channel use agreement. The operator should have the right to obtain appropriate indemnification *before* a program is aired. In addition, the operator should have the right to require reasonable assurance (through demonstration of a programmer's financial qualifications, insurance, bonds, or letters of credit, for example) that the programmer executing the certificate and giving the indemnification is not judgment proof. Absent such indemnification and assurance, the operator has a right to sequester the program or keep it off.

Conclusion

Restrictions on access channel programming in the 1992 Act could impose untenable burdens on everyone involved. The Commission's rules should be aimed at clarifying the operator's obligations in determining the appropriate treatment for access programming. Another important objective for the rules is a fair and effective apportionment of responsibility for the consequences of noncompliance. The Commission has the opportunity to advance both of these objectives by adopting Viacom's recommendations.

Respectfully submitted,

VIACOM INTERNATIONAL INC.

By: /s/
Lawrence W. Secrest, III

/s/
Donna C. Gregg

Its Attorney

WILEY, REIN & FIELDING
1775 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

December 21, 1992

FCC Caption Omitted

COMMENTS OF NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA

The New York Citizens Committee for Responsible Media ("NYCCRM") respectfully submits these reply comments in this proceeding to consider the Commission's proposed rule implementing Section 10 of the Cable Consumer Protection and Competition Act of 1992 ("Cable Act of 1992").

Section 10 would:

A) allow any cable operator to enforce a written and published policy prohibiting any leased access programming which they "reasonably believe" to contain "patently offensive" descriptions or depictions of sexual or excretory activities or organs;

B) require cable operators to place all "indecent" programs, not otherwise prohibited, on a single, blocked channel, to which access is available only through a written subscriber request.

C) require leased access programmers to inform the cable operator if their program contains "indecent" material;

D) allow cable operators to prohibit any programming on public, educational, or government (PEG) access channels that contain "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct".

In addition, Section 10 holds Cable Operators liable for any programming that "involves obscene material" carried on mandatory access channels.

NYCCRM is a not-for-profit, citizens group concerned with issues of public access to the electronic media and media democracy. Its membership includes access producers, community

organizations, independent video and filmmakers, and interested viewers. In the 1980s, NYCCRM New York City during the cable franchising process for the outer boroughs (Brooklyn, Queens, Staten Island, and The Bronx) and the renewal franchising process for Manhattan. Many of its policy recommendations for PEG and Leased Access were adopted by the City as its negotiating position with cable operators. We continue to safeguard the access to the cable medium achieved here in New York City, and work to expand the access concept to new, competing delivery systems that are being introduced in the 1990s.

At the outset, NYCCRM questions the legislative intent of Section 10 of the Cable Act of 1992. This section was introduced during the Senate floor debate, without the benefit of the consideration of the relevant House and Senate Committees. Its primary sponsors were Senator Jesse Helms, (R-NC), who has a long record of attempts to censor the free expression of ideas, and Senator Tim Wirth (D-CO), whose re-election campaigns have always benefited from generous cable industry contributions.

NYCCRM concurs with the comments filed by The Alliance for Communications Democracy, et. al. ("ACD"), that Section 20 and the proposed rule violate applicable First Amendment principles. Nevertheless, NYCCRM recognizes the Commission's obligation to issue a rule implementing Section 10 and offers these brief reply comments to the initial comments on the proposed rule.

I. MANHATTAN PUBLIC ACCESS CHANNELS HAVE BECOME A VITAL PUBLIC FORUM FOR LOCAL EXPRESSION DESPITE CABLE OPERATOR INDIFFERENCE AND HOSTILITY.

As Manhattan Neighborhood Network ("MNN") observes (MNN Comments at 2), public access has existed in Manhattan for more than 20 years, until recently under the administrative control of the two franchised cable operators who serve Manhattan.[1]

---

[1] Indeed, Manhattan was the first major urban area to be wired for cable. The Manhattan experience with public access thus preceded all other experience with cable public access in an urban setting.

MNN further notes that there are currently 590 public access programs offered on Manhattan cable systems, totalling 300 hours of programming per week (MNN Comments at 3). The diversity of that programming is evident from the programming schedule in the June/July 1992 issue of ACCESS MANHATTAN! (See Exhibit A.)

Manhattan's public access channels offer narrowcast programming for every racial and ethnic group living in that borough of New York City. There are, for example, public access programs for African Americans ("Flo Kennedy"), Hispanics ("Latinos En Accion"), Jews ("Jewish Task Force"), and Russian Americans ("Russian-American TV"). There are also public access programs that target Manhattan's sizeable gay population ("Out in the '90s: Gay News Network" and "The Closet Case Show"). Another public access program addresses the concerns of the disabled ("Disabled Hotline"). Many public access programs are devoted to arts and culture (*e.g.*, "Egg Cream Theatre" and "Dave Channon's Volcanic Video"). These include several programs that feature rap, dancehall reggae and world beat music (*e.g.*, "House of Rap" and "Viddyms Reggae & World Beat"). Finally, a number of public access programs address vital issues of local importance (*e.g.*, "Interfaith Assembly on Homelessness and Housing").

Collectively, Manhattan's public access channels serve programming needs largely ignored by Manhattan's franchised cable operators. Some public access programs even counter the cable operators' propaganda accompanying monthly bills to cable subscribers (*e.g.*, "Inter-Active TV with Jim Chladek").[2] These channels thus provide an important public forum for those who live in Manhattan.

---

[2] Another example of how public access channels have enabled cable subscribers to counter cable operators' propaganda occurred several years ago on Long Island, where Cablevision had not renewed Madison Square Garden Network's carriage contract, thus depriving cable subscribers of Yankees' games. A group of subscribers produced a public access program countering Cablevision's version of its dispute with MSGN, which had aired on Long Island 12, Cablevision's local news channel.

The wealth of public access programming in Manhattan is even more impressive, when one considers the franchised cable operators' disinterest in promoting such programming. Over the years, for example, Manhattan Cable Television, Inc. ("MCTV"), the cable operator franchised to serve lower Manhattan during most of the 1970s and 1980s, never provided a studio for public access program productions nor did it list public access programs in its monthly printed guide for cable subscribers.[3]

To be sure, Manhattan's public access channels feature some sexually explicit programming. But such programming may have serious value for the local community. The Closet Case Show, first aired on public access channels in late 1984, has long promoted safe sex activity among gay men, often using explicit films of safe sex practices. A 1987 study sponsored by the Gay Men's Health Crisis concluded that such sexually explicit programming was often more effective than other techniques in discouraging risky sexual behavior. Various segments of The Closet Case Show have received critical acclaim from the gay community here and abroad. Despite the serious value of such programming, MCTV has regularly censored The Closet Case Show in violation of Section 611(c) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 531(c), which precluded such assertion of editorial control. (See Exhibit C.)

The Commission is well aware that public access programs such as The Closet Case Show will almost certainly disappear from public (and leased) access channels if Section 10 of the 1992 Cable Act is implemented, notwithstanding the serious value of such programming. Just as broadcasters and cable operators have balked

---

[3] MCTV also periodically preempted public access channel time to offer its own cable programming, in violation of its franchise agreement with New York City. On April 6, 1985, for example, it unlawfully preempted four public access producers during two prime-time hours to present The Nashville Network's live show from Radio City Music Hall. See Exhibit B.

at airing graphic anti-abortion ads,[4] cable operators will henceforth censor sexually explicit programming over access channels, even if such programming concerns core political speech.[5]

II. SECTION 10 AND THE PROPOSED RULE VIOLATE APPLICABLE FIRST AMENDMENT PRINCIPLES.

NYCCRM agrees with ACD that Section 10 of the 1992 Cable Act and the proposed rule violate basic First Amendment principles. Nevertheless, we believe that some of ACD's analysis requires elaboration and clarification.

A. PUBLIC ACCESS CHANNELS ARE TRADITIONAL PUBLIC FORA.

ACD correctly observes that public access channels are locally created public fora, but suggest that they are designated rather than traditional public fora. (ACD Comments at 34-38.) To the contrary, we believe that public access channels fall in the latter category of public fora.

---

[4] *FCC Asked to Rule Fetus Image Indecent*, Broadcasting, Aug. 3, 1992, at 57; *Abortion Political Ad Question Back at FCC*, Broadcasting, Sept. 7, 1992, at 30; *Harbor for Abortion Ads*, Broadcasting, Nov. 2, 1992, at 26; *FCC Drifts Toward Safe Harbor for Abortion Ads*, Broadcasting, Nov. 9, 1992, at 48; *Ga. Anti-Abortion Ads Spark Fireworks*, Multichannel News, July 13, 1992, at 20; *St. Louis Systems Run Anti-Abortion Ads*, Multichannel News, July 27, 1992, at 38; *Milwaukee Airs Anti-Abortion Ads*, Multichannel News, Oct. 19, 1992, at 20.

[5] There is a long tradition of mixing sexually explicit materials with core political speech. During the French Revolution, for example, a print entitled *Grand DeBandement de L'armee Anticonstitutionelle* appeared in an ultra-royalist newspaper. It portrayed the royalist army dispersing because several women with revolutionary sympathies had lifted their skirts and disrespectfully displayed their buttocks. The title contains several puns deriving from the various meanings of "debander," which include "to disband" and "to lose one's erection." V. Cameron, *Political Exposures: Sexuality and Caricature in the French Revolution* in *Eroticism and the Body Politic* 90-95 (L. Hunt ed. 1991).

Traditional public fora consist of "places which by long tradition or by government fiat have been devoted to assembly and debate . . . ." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The clearest examples of such public fora are public streets, sidewalks and parks. *Id.*; *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). But the category is not limited to such "quintessential" public fora. *Perry*, 460 U.S. at 45. Traditional public fora may include "'other similar public places.'" *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976), quoting *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968), *overruled on other grounds*, *Hudgens v. NLRB*, 424 U.S. 507 (1976). *See also United States v. Grace*, 461 U.S. 171, 177(198) (traditional public fora include "'public places' historically associated with the free exercise of oppressive activities, such as streets, sidewalks and parks" (emphasis added)). Moreover, the category is not static, since it includes public fora "clearly held in trust, either by tradition *or recent convention*, for the use of the citizens at large." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.2 (1984). Such "recent convention" may result from "government fiat." *Perry*, 460 U.S. at 45.

Public access channels clearly fall in the category of traditional public fora. Whether by "government fiat" or "recent convention," or both, these channels have typically been available to the public for oppressive activities since their creation. Indeed, in recognizing that "[p]ublic access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet," H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4667, Congress virtually equated public access channels to public streets, sidewalks and parks, where speakers address crowds on soap boxes and hand out printed leaflets.

The decision in *Missouri Knights of the Ku Klux Klan v. Kansas City, Mo.*, 723 F. Supp. 1347 (W.D. Mo. 1989), is not to the contrary. Plaintiffs there argued that Kansas City's public access channel was a traditional public forum. The court only assumed

"for the sake of argument" that the channel was merely a designated public forum. *Id.*, at 1352.

B. THE EFFECTIVENESS OF LOCKBOX DEVICES DISTINGUISH THE CABLE MEDIUM FROM BOTH THE BROADCAST AND TELEPHONE MEDIA.

ACD also persuasively argues that the unique features of the cable medium make the content-based, "indecency" regulation upheld for the broadcast medium, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), inappropriate for the cable medium. ACD Comments at 38-42. Not only is there no "captive audience" for cable service, *Sable Communications v. FCC*, 492 U.S. 115, 127-28 (1989), since one "must make the affirmative decision to bring [cable service] into his home," *Cruz v. Ferre*, 775 F.2d 1415, 1419 (11th Cir. 1985), but parents also have "the ability to protect children" from unsuitable cable programming through the use of a "'lockbox' or 'parental key'" available from cable operators. *Id.* at 1415, 1420.

ACD neglects, however, to point out that lock-out features are now included in addressable converters, at no additional charge. The Time Warner cable systems in Now York City, for example, advise cable subscribers in the local editions of *TV Guide*, that "[y]our convertor is equipped with a device that allows you to block out any program you do not wish your children to watch." (See Exhibit D.) Because every cable system will eventually be addressable, all cable subscriber will eventually have converters with lock-out features, enabling them to block offensive programming without additional charge.

The effectiveness of cable lockbox devices not only distinguishes the cable medium from the broadcast medium, as ACD notes, but also distinguishes it from the telephone medium, for which the Commission has found customer premises blocking devices to be ineffective in enabling parents to monitor their children's access to adult message services. *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 554 (2d Cir. 1988), *cert. denied*, 488 U.S. 924 (1988). The court decisions which uphold more restrictive regulation of indecent telephone communications, id. at 557, *Dial Info Servs Corp. v. Thornburgh*,

938 F.2d 1535 (2d Cir 1991), *cert. denied*, 112 S.Ct. 966 (1992), are thus inapposite.

C. THE GROWTH IN ADULT PAY PER VIEW PROGRAMMING AMPLY DEMONSTRATES THE UNDERINCLUSIVENESS OF SECTION 10 AND THE PROPOSED RULE.

Recognizing a compelling governmental interest in the protection of minors from cable programming deemed unsuitable for viewing by their parents, we nevertheless agree with ACD that Section 10 and the proposed rules are underinclusive, given that they only concern sexually explicit programming on access channels (ACD Comments at 49-53). In reality, there is as much, if not more, sexually explicit programming on the other cable channels, including those dedicated to pay per view.

Many cable operators now offer at least one adult pay per view channel. Playboy at Night is currently available to 7.6 million addressable subscribers on 239 cable systems, while Spice (originally named Rendezvous) is currently available to 5 million addressable subscribers on 123 cable systems. *Database*, Cablevision, Dec 14, 1992, at 51. Both have experienced rapid growth since their launches only three years ago. *Id.*, Playboy at Night expects to double its current subscriber base within a year. *Playboy May Go to Around the Clock Format*, Multichannel News, June 29, 1992, at 6. While many cable operators initially offered Playboy at Night and Spice only during late night hours, some cable operators now offer these pay per view channels during daytime hours. *Id.*; *Keeping It Quiet*, Cablevision, April 8, 1991, at 16. The cable industry has become wildly enthusiastic about Playboy at Night, doubtless because it has generated over $50 million in revenues for cable operators. *Playboy Looks Good to Ops*, - Cablevision, June 1, 1992, at 12. The adult pay per view channel recently introduced a new show, "Secret Confessions and Fantasies," in which individuals described "their wildest sexual escapades — real or wished for — while the fantasies are reenacted by actors." *A(nother) New View of Playboy*, Cablevision, Nov. 30, 1992, at 22. Adult pay per view programming has proven to be so popular with cable operators and cable subscribers that two other

pay per view services have announced plans to launch adult pay per view channels. *Id. See also Request Television Eyeing an Adult Channel*, Multichannel News, Oct. 5, 1992, at 26.[6]

Given the dramatic growth in adult pay per view programming offered over cable channels, it is patently clear that Section 10 and the proposed rule — insofar as they purport to protect minors from programming which their parents deem unsuitable for viewing — is underinclusive. Simply put, the majority of sexually explicit cable programming is found on channels under cable operators' editorial control, not on access channels.

ACD suggest that the narrow focus of Section 10 and the proposed rule may reflect a bias against viewpoints expressed on access channels. (ACD Comments at 52-53.) We believe that it also reflects a willingness to protect cable operators from competition in the market for adult programming services. If cable operators are allowed to eliminate or restrict sexually explicit programming on access channels, there will be less competition for their own sexually explicit programming. Thus, cable operators may well censor sexually explicit access programming, but offer comparable programming on other channels.

CONCLUSION

NYCCRM agrees with ACD that Section 10 of the Cable Act of 1992 and the proposed rule (as best we can ascertain, given its broad and imprecise language) violate applicable First Amendment principles. They effectively grant private companies (cable operators) the power to act as public censors, a power traditionally reserved to government, and then only in very narrowly prescribed circumstances.

Censorship of access channels is unnecessary since technology has made it possible to fulfill the only legitimate government

---

[6] The Time Warner cable systems in New York City now offer both Playboy at Night and Spice during daytime hours. As already noted, cable subscribers are advised that "[y]our converter is equipped with a device that allows you to block out any program you do not wish your children to watch." (See Exhibit D.)

interest, *e.g.*, which is to ensure that parents have the ability to protect their children from obscene and indecent programming on PEG and leased access channels. Furthermore, we feel that this technology, lockboxes, places the decision making power over children's viewing access where it belongs — *with parents*.

Allowing a cable operator to censor access programming is not only unnecessary but is also harmful to true diversity, conferring such power on cable operators grants an active and interested party the ability to harass PEG and leased access producers for a number of purposes:

1) to regain channel capacity that they can re-program for profit;

2) reduce competition for their own premium and pay per view adult programming; and

3) demand rate increases ostensibly to cover the technical costs of blocking channels or specific programs, and enforcement of censorship policies.

Ironically, adult pay per view channels, in which cable operators have a financial interest, would remain exempt from censorship, even though they raise the same parental concerns.

Given the vague criteria for censoring access programming, it seems inevitable that many disputes will arise. Public and leased access was created to give voice to economically and politically disenfranchised citizens, who have been shut out of the dominant commercial media. Access producers are dedicated citizens and entrepreneurs, often working in their spare time, with limited resources. Whatever methods the Commission adopts for settling disputes between cable operators and producers over censorship of programming will inevitably be unfair and ineffective, given the vast disparity of economic and legal resources available to the disputants. Many access producers will simply give up and not bother to produce shows. In any event, these disputes will create unnecessary delays in the cablecast of timely programs and seriously undermine the First Amendment goals of public and leased access.

NYCCRM urges the Commission to make lockboxes even more effective by encouraging access producers to provide descriptions of their programming prior to its presentation on access channels. Moreover, cable operators should be required to list access programs in all printed and electronic program guides. This will allow viewers to make informed viewing judgements, block whatever programming they deem necessary, or cancel their cable subscription. A review of lockbox provisions should be undertaken by the Commission to ensure their universal availability and cable operator promotion.

In conclusion, NYCCRM feels that these suggestions represent the least intrusive method for effectively addressing parental concerns, and the best way to ensure the continued viability of PEG and leased access, the people's voice.

Respectfully submitted,

/s/
Lawrence S. White
Chairperson, NYCCRM
370 West 30th Street, Apt. 4B
New York, NY 10001

/s/
Robert T. Perry
509 12th Street, Apt. 2C
Brooklyn, NY 11215
(718) 768-2209

/s/
Adam Rosenberg
125 Stanton Street, Apt. 8
New York, NY 10002

December 22, 1992

EXHIBIT D

Adults Only

(Parental Control Advised)

CHANNEL 62 **PLAYBOY At Night**

Now you can enjoy Playboy At Night's original programs and top quality adult entertainment for only **$4.95 per night** (8pm to 6am).

Watch for these great December highlights:

EDEN
INSIDE OUT
DIVORCE LAW
FRENCH KISSES
NAUGHTY GAMES
FOR A GOOD TIME CALL...

TO ORDER PER NIGHT (8pm-6am) call 1-800-379-6262 starting at 7pm or during show.

CHANNEL 63 **Spice**
7:30am - 3am

We offer a scintillating film every 90 minutes starting at 7:30am. This month order:

WACS
ALL THAT SEX
THE LAST RESORT
THE BAD NEWS BRATS
HEAVENLY HYAPATIA
and many more...

Edited for pay-per-view

TO ORDER call 1-800-379-6363 within one hour of start time. For daily titles and start time information about Spice films on Channel 63, please tune to the PreVue Guide (Channel 40). All adult films $4.95 each.

Channels Listed in the Manhattan Cable TV Edition

(CC) Black-and-white (CC) Color ... version

Broadcast Stations*

—New York City—

[illegible] WPIX (Prod) 11
[illegible] WNET (PBS) 13
[illegible] WNYE (PBS) 25
[illegible] WNJU (TEL) 46

—Long Island—

[illegible] WLIW (PBS) 21

—Paterson—

[illegible] WCTV (UHF) 12

Chs. 13, 21/24 and 25 schedule instructional programs during the school year.

Cable TV*

Cable Service Abbreviation—Manhattan Cable TV Channel Number.

[illegible] A&E Entertainment Network 37
[illegible] American Movie Classics 38
[illegible] Black Entertainment Television 57
[illegible] Bravo 54
[illegible] The Cartoon Network 77
[illegible] CBS/Fox Video Network 42
[illegible] CNN-TV 29
[illegible] Comedy Central 28
[illegible] C-SPAN 28
[illegible] The Disney Channel 53
[illegible] The Discovery Channel 37
[illegible] ESPN 24
[illegible] The Family Channel 47
[illegible] Galavision 72
[illegible] Home Box Office 33
[illegible] Lifetime 48
[illegible] Cinemax 45
[illegible] Madison Square Garden Network 10
[illegible] Madison Square Garden I 26
[illegible] Madison Square Garden II 27
[illegible] Music Television 49
[illegible] Nickelodeon 36
[illegible] The Movie Channel 71**
[illegible] SportsChannel 59
[illegible] SportsChannel America 27
[illegible] SportsChannel America 76
[illegible] Showtime 41
[illegible] TBS SuperStation 43
[illegible] The Nashville Network 49
[illegible] Turner Network Television 52
[illegible] USA Network 44

Pay-Per-View Channels

[illegible]

Daily listings in our programming section. Check This Week's Pay-Per-View.

[illegible] Fantasy All Night

See Daily listings, Movie Channels, Movie Guide and This Week's Pay-Per-View for details.

*VCR Plus + (Instant Programming). The numbers that appear above next to each broadcast and cable channel, as well as the PlusCode® numbers on most daily listings, are for the convenience of viewers who own VCR Plus + ® devices for VCR tuning. Owners of those devices should follow the directions in the owner's manual. Call 1-800-432-1-VCR for further information. VCR Plus + ® and PlusCode® are trademarks of Gemstar Development Corporation. PlusCode® numbers copyright 1992 GDC. All rights reserved.

Manhattan Cable TV also offers the following services. See the connection guide for optional information. The Bee and Video Hits One (MHz) cannot be received by most cable. Cable Satellite Public Affairs Network (C-SPAN) and C-SPAN 2 cover House and Senate sessions respectively, as well as Congressional hearings and public-affairs programming. The Cartoon Network is programmed entirely with cartoons. CNBC offers financial news, talk shows and talk shows. Court TV provides coverage of court trials nationwide. Documentary programming is available on Channel 74. El Entertainment Television highlights various aspects of the entertainment industry. Headline News provides continuous news updates. Home Shopping Network (Ch. 28) and QVC are shopping-by-phone services. National Jewish Television (NJT) (Sundays 1-4 P.M. on Ch. 29) is a religious and family-entertainment channel. New York 1 News is a 24-hour, all-news cable service for New York City only. Randolph Television offers entertainment and lifestyle programming for adults aged 45+. Public Access programming is available 24 hours daily on Channels 16 and 17. The Travel Channel provides information on business and leisure travel. Video Interfaith Satellite Network is a religious and family-entertainment channel. The Weather Channel reports on national & local weather. Channels 26 and 35 are available for Commercial Use programming.

Symbols for leasing-required channels: (CO) Closed-captioned (CC) Open-captioned (SL) Sign language

	SATURDAY December 12	SUNDAY December 13	MONDAY December 14	TUESDAY December 15	WEDNESDAY December 16	THURSDAY December 17	FRIDAY December 18
(50)	**SLEEPWALKERS** 9AM, 11AM, 1PM, 3PM, 5PM, 7PM, 9PM, 11PM, 1AM, 3AM			**ENCINO MAN** 9AM, 11AM, 1PM, 3PM, 5PM, 7PM, 9PM, 11PM, 1AM, 3AM			
(40)	**FAR AND AWAY** 7:30AM, 10AM, 12:30PM, 3PM, 5:30PM, 8PM, 10:30PM, 1AM						
(62)	**THE CUTTING EDGE** 9AM, 11AM, 1PM, 3PM, 5PM, 7PM, 9PM, 11PM, 1AM, 3AM			**MY COUSIN VINNY** 8:30AM, 11AM, 1:30PM, 4PM 6:30PM, 9PM, 11:30PM, 2AM			
(60)	Playboy at Night Adult programming nightly (8PM-6AM). See nightly program grids for details.						
(63)	Spice Adult movies (7:30AM-3AM). See channel 40 and nightly program grids.						
	Cutting Edge 6a, 1p, 5p, 3a Encino Man 8a Far and Away 10:30a Sleep-walkers 3p, 7p, 1a Boxing 9p	Sleep-walkers 6a, 1p Far and Away 8a, 5p One Flew Over the Cuckoo's Nest 10:30a, 8p, 12:30a Encino Man 3p, 10:30p, 3a	Cutting Edge 11a City of Joy 1p, 8p, 12:30a Encino Man 3:30p Far and Away 5:30p Sleep-walkers 10:30p, 3a	City of Joy 10:30a, 5:30p, 10p, 2:30a Encino Man 1p, 8p, 12:30a Far and Away 3p	Far and Away 10:30a City of Joy 1p, 8p, 12:30a One Flew Over... 3:30p Sleep-walkers 6p Cutting Edge 10:30p, 3a	City of Joy 10:30a One Flew Over... 1p Far and Away 3:30p Cutting Edge 6p Sleep-walkers 8p, 12m, 4a St. Tropez Sexe 10p, 2a	Encino Man 10a, 12n, 2p, 4p, 6p, 8p, 10p, 12m, 2a, 4a

PARENTAL CONTROL DEVICE

Your addressable channel selector is equipped with a device that allows you to block out any program you do not wish your children to watch. Information is available in your customer handbook. If you wish to lock out your account from our automated order system, please call 533-4722.

HOW TO ORDER

To order automatically: within 1 hour before the start of the movie call the toll-free number that corresponds to the appropriate channel. Listen for a message confirming your order.

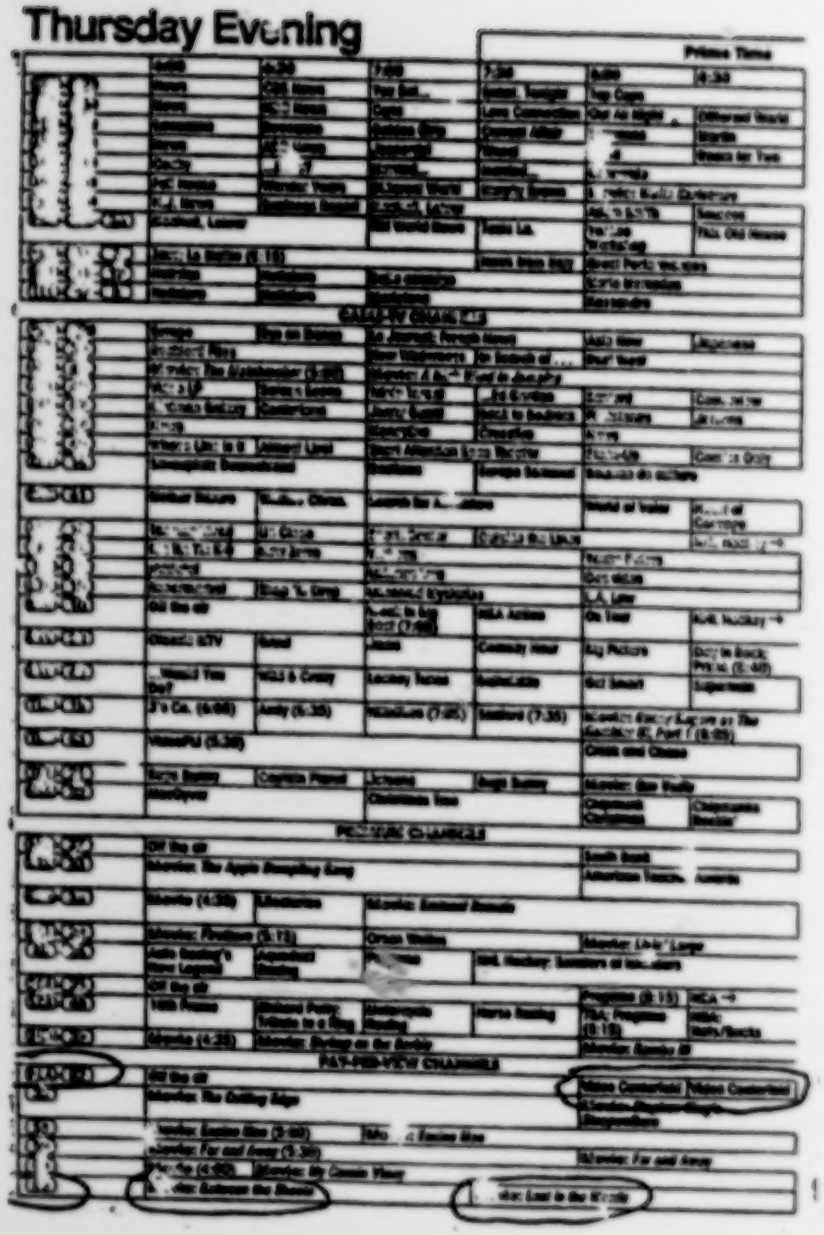
Channel 38: 1-800-379-3838 Channel 58: 1-800-379-5858
Channel 59: 1-800-379-5959 Channel 60: 1-800-379-6060
Channel 62: 1-800-379-6262 Channel 63: 1-800-379-6363

Be sure to call from your home phone. These numbers are for ordering only, not for information. Channels 58, 59, 60, 62 and 63 are only available to residential customers in rebuilt areas.

All hit movies $3.95. All adult movies $4.95. Playboy at Night $4.95 per night (Call between 7PM-3AM). Events are individually priced. Adult movies edited for PPV.

Available to residential customers using an addressable channel selector. Calls to the 800 number will result in an automatic charge to your account. Programming and prices subject to change. MCTV is not responsible for orders not accepted due to technical difficulties (including VCR tapings) or discrepancies in customers' accounts. MCTV is available from E. 86th St. and W. 79th St. south to Battery Park, including Roosevelt Island.

Thursday Evening



Note: Channels 16 & 17 are Public Access - they are not listed in this guide

FCC Caption Omitted

PETITION FOR RECONSIDERATION OF THE NYNEX TELEPHONE COMPANIES

New York Telephone Company and New England Telephone and Telegraph Company (the "NYNEX Telephone Companies" or "NTCs") respectfully ask the Commission to reconsider certain aspects of its First Report And Order released February 3, 1992.[1] In particular, the NTCs are concerned that, by giving cable operators "wide discretion" in banning programming they deem indecent, and by allowing cable operators to ban some but not all indecent programming, the Commission has invited Cable operators to unreasonably deny access to leased channel capacity, and to discriminate among potential customers based on factors other than the indecency of their programming. In addition, by giving aggrieved customers access only to the courts for remedy if access to leased channels is unreasonably denied, the Commission abdicates its role under the Cable Act to provide expedited procedures for insuring reasonable terms and conditions for leased access channels.

I. DISCUSSION

The 1992 Cable Act permits Cable operators:

> to enforce a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs

---

[1] In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, Indecent Programming and Other Types of Materials on Cable Access Channels, MM Docket No. 92-258, First Report and Order, February 3, 1993,

> in a patently offensive manner as measured by contemporary city standards.[2]

In its First Report and Order, the Commission stated that this provision gives cable operators "wide discretion" in classifying programming as indecent, and in enforcing a policy of prohibiting indecent programming.[3] The Commission stated that cable operators may adopt "any measures" appropriate for implementation of such a policy, and that cable operators "have the discretion to prohibit some, but not necessarily all, indecent programming."[4] The Commission concluded that "the courts, rather than this agency, are the appropriate forums for resolution of any disputes concerning whether cable operators have properly denied access pursuant to section 10(a)."[5]

These actions conflict with the Commission's obligations under other sections of the 1992 Cable Act. In particular, Section 9 of the Cable Act requires the Commission to make rules establishing reasonable terms and conditions for commercial use of leased channel capacity, and to establish procedures for the expedited resolution of disputes.[6] Section 11 requires the Commission to ensure that no cable operator can unfairly impede the flow of video programming from the video programmer to the consumer.[7] In Comments on the implementation of Section 9, the NYNEX Telephone Companies urged the Commission to require cable operators to offer channel capacity to unaffiliated entities on nondiscriminatory prices, terms and conditions, and to require that

---

2 1992 Cable Act § 10.

3 First Report and Order ¶ 29.

4 *Id.* ¶ 31.

5 *Id.*

6 1992 Cable Act § 9(b).

7 1992 Cable Act § 11(c).

a cable operator may not refuse a reasonable request for channel capacity.[8]

By giving cable operators "wide discretion" in determining what they believe is indecent and in enforcing their policies, unchecked by any Commission supervision, and by explicitly allowing cable operators to discriminate among providers of "indecent" programming, the Commission positively invites cable operators to unreasonably deny access to their channel capacity. Thus, cable operators have a means to block programming from reaching subscribers based on factors unrelated to indecent programming. For example, the Commission's language allowing discrimination would appear to allow cable operators to ban indecent programming provided by a competitor, while accepting the same programming provided by an affiliated programmer or another noncompeting entity. And, by giving customers unreasonably denied access under the guise of "indecency" recourse only to the courts, the Commission is perpetuating the problems of difficulty and delay in obtaining access to leased channel capacity that Congress sought to prevent in enacting Section 9.[9]

The Commission should remedy these aspects of the First Report and Order by ruling that the cable operator may not discriminate among providers of like programming. Further, the Commission should emphasize the Cable Act's requirement that the cable operator may not prohibit programming unless the cable operator "reasonably" believes it is indecent *because* it contains the elements listed in Section 10. Finally, the Commission should allow customers unreasonably denied access to leased channels redress under the expedited procedures established under Section 9, rather than requiring them to go to court.

---

8 Comments of the NYNEX Telephone Companies, MM Docket No. 92-266, January 27, 1993, pp. 18-19.

9 *See* House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong. 2d Sess. (1992) ("House Report") pp. 39-40.

II. CONCLUSION

For the reasons stated herein, the NYNEX Telephone Companies respectfully ask the Commission to reconsider the First Report and Order, and to conform it with sections of the Cable Act mandating reasonable and nondiscriminatory access to leased channels, and expedited procedures for resolving disputes.

Respectfully submitted,

New York Telephone Company
and
New England Telephone and
Telegraph Company

By: /s/
Mary McDermott
Shelley E. Harms

120 Bloomingdale Road
White Plains, NY 10605
914/644-2764

Their Attorneys

Dated: March 15, 1993

FCC Caption Omitted

OPPOSITION OF
TIME WARNER ENTERTAINMENT COMPANY, L.P.
TO THE PETITION FOR RECONSIDERATION
OF THE NYNEX TELEPHONE COMPANIES

Time Warner Entertainment Company, L.P. ("TWE") opposes the Petition for Reconsideration filed by the NYNEX Telephone Companies ("NYNEX"). NYNEX offers nothing to explain its interest in this proceeding. Rather, it gratuitously suggests that the Commission ignore the language of § 10 of the Cable Television Consumer Protection and Competition Act of 1992, and, based on NYNEX's view of the objectives of other parts of the Act, suggests that the Commission read into § 10(a) an unjustifiable limitation on the cable operator's discretion in dealing with indecent programming on leased access (commercial use) channels.

The Commission correctly determined from the language of § 10, as well as the statements by the Section's sponsor, that § 10(a) was envisioned as giving cable operators "wide discretion" in formulating and implementing a policy prohibiting indecent programming. As the Section's author indicated, § 10(a) essentially returns to the cable operator a small part of its editorial discretion that is otherwise restricted by § 612(c)(2) of the 1984 Cable Act (47 U.S.C. § 532(c)(2)). With respect to indecent programming, the cable operator is acting an a "private party". (138 Cong. Rec. § 646 (Remarks of Sen. Helms, daily ed. Jan. 30, 1991; Report and Order, MM Docket 92-258, at ¶ 30 n.25)) As such, its editorial decisions should not be restricted unless a programmer can demonstrate that the cable operator has denied it access unreasonably under § 612(d) of the 1984 Cable Act.

NYNEX offers no factual basis for its argument that the Commission should assume cable operators will misuse § 10(a). Moreover, its one example of possible misuse does not support its position. NYNEX posits that the Commission's interpretation of

§ 10(a) would permit a cable operator to refuse indecent programming from a competitor while accepting "the same programming provided by an affiliated programmer or another noncompeting entity". (NYNEX Petition at 4)

First, channel capacity used by programmers affiliated with the cable operator is not considered leased access capacity. Therefore, on leased access channels there can be no discrimination between affiliated programmers and other programmers.

Second, in any event, It is difficult to envision how one could determine that different indecent programs are "the same". Within the category of indecent programming there are infinite gradations of indecency ranging from the relatively tame to those that almost cross the line into obscenity. Therefore, cable operators should be permitted to discriminate among various indecent programs unless such discrimination can be shown to be inconsistent with the statutory goals. This is fully consistent with the approach under § 612 of the 1984 Cable Act. Under § 612 price discrimination is acceptable among leased access users, and indeed encouraged by Congress. (H.R. Rep. No. 934, 98th Cong., 2d Sess. 51, *reprinted in* 1984 U.S.C.C.A.N. 4688).[1]

Third, with respect to discriminating in favor of "noncompeting entit[ies]", NYNEX does not explain what type of entities would be "competing" or "noncompeting", or why an operator would want to take the latter's programming in preference to the former's.

Finally, the Commission correctly noted that Congress did not appear to envision a role for the FCC under § 10(a), unlike § 10(b) where the statute specifically directs the promulgation of rules. Where the Commission has instituted regulations it often makes sense for it to oversee compliance. Where it has not, the converse is true. Therefore, it is perfectly consistent for the Commission to leave disputes arising under § 10(a) to be resolved in a court action under § 612(d).

---

[1] Cable operators also exercise some level of discretion in allocating leased access time to programmers when demand outstrips supply.

Conclusion

TWE respectfully suggests that the Commission deny the NYNEX Petition for Reconsideration.

Respectfully submitted,

TIME WARNER ENTERTAINMENT
COMPANY, L.P.

/s/
Stuart W. Gold

Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Its Attorneys

April 7, 1993

FCC Caption Omitted

REPLY OF THE NYNEX TELEPHONE COMPANIES TO COMMENTS OPPOSING THEIR PETITION FOR RECONSIDERATION

New England Telephone and Telegraph and New York Telephone Company (the "NYNEX Telephone Companies" or "NTCs") filed their Petition for Reconsideration in pursuit of one purpose, that the Commission adhere to the goals of competition and protection set forth by Congress in the 1992 Cable Act.[1] To this end the NYNEX Telephone Companies have urged the Commission to adopt carefully tailored rules to assure that cable operators do not use the discretion granted them under Section 10(a) as a means to unreasonably deny access to leased channels to competitors in the guise of prohibiting indecent programming, and to assure that aggrieved customers have meaningful relief in the form of recourse to the Commission through expedited procedures established elsewhere in this rulemaking.

I. DISCUSSION

Only two parties have opposed the NYNEX Telephone Companies' Petition, Time Warner Entertainment Company, L.P. ("Time Warner") and the National Cable Television Association ("NCTA"). Each party claims that the NTCs seek to unjustifiably limit cable operators' discretion in dealing with indecent programming on leased access channels. Such is not the case. The NTCs are simply asking the Commission to adopt measures which

[1] Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") Pub. L. No. 102-385.

will assure that the discretion granted to the cable operators is not abused.[2]

Time Warner and NCTA each allege that the type of abuse that motivated the NTCs to file their Petition cannot occur. This is based on the strained argument that a cable operator cannot favor an affiliated programmer over a nonaffiliated programmer because an affiliated programmer is not considered a leased access channel customer. "Therefore, on *leased access channels* there can be no discrimination between affiliated programmers and other programmers."[3]

This argument merely serves to highlight the NTCs' concerns. The type of discrimination to which the NTCs refer would take place across channel capacity, and is not limited to a cable operator's activities on leased access channels. A cable operator may, for example, decide to allow an affiliated programmer to run a particular program or class of programs over its own channels, while denying an unaffiliated programmer the ability to run the same or similar programs over a leased access channel. If cable operators indeed read the Act as isolating the potential for arbitrary

[2] Time Warner (at 1) and NCTA (at 1) question the NTCs' interest in this proceeding. The cable and telecommunications industries are converging. It is certainly possible that the NTCs will be leasees of channel capacity in the future. The NTCs filed extensive comments and reply comments in the related Cable Rate Regulation Docket (MM 92-266). As set forth in those comments, the NTCs are concerned that the Cable companies are moving aggressively into the telecommunication market without constraints, and indications are that they may use their monopoly rents from cable television to subsidize the telephone ventures. NYNEX Comments at 3. By their comments the NTCs have consistently argued that reasonable and nondiscriminatory access to leased access channels is essential to creating a competitive market. Indeed by their Reply Comments, the NTCs raised their concerns that the wide discretion being granted in this proceeding could lead to the unreasonable denial of leased access channel capacity. Thus the NTCs have a clear and established interest in this proceeding.

[3] Time Warner at 3; see also NCTA at 6.

discrimination to leased accessed channels, they will feel free under cover of the fig leaf provided by Section 10(a) to favor their affiliate programmers over non-affiliates who seek to use leased access to provide competitive offerings.

Congress, in adopting the Act, recognized the potential for discrimination across channels. As noted in the Senate Report to the 1992 Cable Act,

> For irrefutable evidence of the failure of the leased access provision, one need look no further than the marketplace. Despite widespread instances of dropping of local broadcast stations and refusals to carry competitive program services, there is no evidence that excluded programmers have been successful in gaining access through Section 612 ....
>
> The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer.[4]

This excerpt from the Senate Report also refutes the claim that the NTCs raised only a spectre of harm,[5] or that its concerns lack a factual basis.[6]

Both Time Warner[7] and NCTA[8] argue that Section 10(a) restores editorial discretion otherwise restricted by Section 612(c)(2) of the 1984 Cable Act, and that as such the cable operator's discretion regarding indecent programming should be given broad berth. However, because it is the exception to the general rule, the

---

4 Senate Report 109-92 at p. 30.

5 NCTA at 2.

6 Time Warner at 2.

7 Time Warner at 2.

8 NCTA at 4.

Commission should place at least some parameters around this discretion.

The opposing parties state that the NTCs' request that the FCC reconsider its rule to make certain that the cable operator may not discriminate among providers of like programming will be difficult to administer and should, therefore, be rejected by the Commission. Inconvenience should not in itself excuse the cable operators — or the Commission — from adopting measures to limit arbitrary discrimination that would impede the fundamental purpose of the Act, that is to promote competition. The Commission has required common carriers to administer equally unwieldy standards under even more difficult circumstances.[9]

Administrative safeguards that allow the cable operators editorial discretion while protecting the leased access programmer can, and should be crafted. For example, similar to the proposal offered by Denver Access[10] in their comments in this proceeding, the cable operator could be required to give advance written notice of its determination, stating with precision what provision of the standard set forth in Section 10(a) led to the conclusion that the program was indecent. Such a procedure would not, in any way, limit the cable operator's discretion, only make the operator

---

9 The Commission need only look to the same "Indecency" issue as it has developed over recent years in the common carrier arena. Another example is the Commission's recent order on telecommunications relay service that prohibits communications assistants "from intentionally altering a relayed conversation and, to the extent that it is not inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes, must relay all conversations verbatim.... 47 CFR § 64.604(a)(2). Thus the communications assistant is, in essence, required to make an on the spot determination that the telephone company's facilities are not being used for illegal purposes. Clearly this is a much greater burden than requiring cable operators to justify what Section 10(a) elements a program allegedly violates.

10 *See* Comments of Denver Area Educational Telecommunications Consortium, Inc, ("Denver Access"), MM Docket No. 92-258, at 10.

accountable for its decision, and thus help assure that the decision is based on the elements contained in section 10(a).

The NTCs have also petitioned the Commission to reconsider its decision to give aggrieved customers access only to the courts if access to leased channels is unreasonably denied. Denver Access' comments, based on its experience, demonstrated that seeking recourse through the courts can be costly and time consuming, nearly rendering relief meaningless.[11]

As the Commission itself recently noted

> Given the lack of focus on leased channel issues in this proceeding and the absence of Commission experience in administering rules of this type... [a]n expedited complaint process will be used to address complaints regarding leased channel rate and access issues.[12]

Clearly, the absence of experience with the open discretion being proposed for cable operators regarding indecent programming over leased access channels, coupled with the potential to abuse the discretion for anticompetitive purposes, should lead the Commission to extend its expedited complaint process to claims brought under Section 10(a).

II. CONCLUSION

For the reasons set forth herein, the NYNEX Telephone Companies again respectfully ask the Commission to reconsider its First Report and Order, and to conform it with the sections of the

---

[11] *Id.* at 3-5.

[12] *See* FCC News Release re: MM Docket No. 92-266 "Summary of Rate Regulation Report and Order" para. 62 (April 1, 1993).

Cable Act mandating reasonable and nondiscriminatory access to leased channels and expedited procedures for resolving disputes.

Respectfully submitted,

New York Telephone Company
and
New England Telephone and
Telegraph Company

By: /s/
Mary McDermott
Carlos J. Sandoval

120 Bloomingdale Road
White Plains, NY 10605
914/644-2764

Their Attorneys

Dated: May 6, 1993

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. and AMERICAN CIVIL LIBERTIES UNION,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

No. 93-1171

DECLARATION OF JOHN B. SCHWARTZ

John B. Schwartz, under penalty of perjury, declares:

1. I am the President of petitioner Denver Area Educational Telecommunications Consortium, Inc. ("The 90's Channel" or "DAETC"). I submit this declaration on personal knowledge to demonstrate the irreparable harm that the Commission's new cable access indecency rules will cause The 90's Channel, in support of petitioners' motion for a stay.

2. DAETC, a Colorado non-profit corporation, is a cable programmer operating a leased access cable service known as The 90's Channel, currently reaching approximately 500,000 basic cable subscribers to cable systems owned by Tele-Communications, Inc. ("TCI") in Arizona, California, Connecticut, Colorado, Maryland, and Michigan.

3. The 90's Channel carries a wide variety of material, much of it both controversial and otherwise unavailable to viewers. It transmits documentaries and magazine programs on political, environmental, labor, and social topics, and many of its programs express opinions, which are generally progressive.

4. The 90's Channel does not carry pornography, and has never carried a full-length program that dealt with sexuality *per se*.

Most of its programming has no sexual content. Nonetheless, a small but important portion of its programming has dealt with such topics as arts censorship, gay rights, feminism, prostitution, and AIDS, and its coverage of those matters has on occasion inextricably included discussion of sexuality and the description or depiction of sexual activity.

5. Among past programs that The 90's Channel has presented that I do not believe to be indecent, but which we would probably have self-censored had the Commission's new rules been in effect because of our concern (described at greater length in paragraphs 7-10 below) for the legal consequences and economic costs of defending against them, are:

- "Self-help", which shows a women's health organization in Austin, Texas attempting to demystify gynecology, teaching women how to perform their own pelvic examinations. The intimidating nature of gynecological procedures are described, and an internal examination is shown.
- "DiAna's Hair Ego" is a video about a black hairdresser in South Carolina who provides her customers not only with grooming and neighborhood gossip but also with AIDS education, condoms, and safe sex advice.
- "Mapplethorpe Exhibit," exploring the controversy over the Robert Mapplethorpe exhibit at a Boston art museum. Interviews with attendees are interspersed with images of many of the photos, including some of his most dramatic nudes. The view of one man that $30,000 in government funding was spent "to put picture frames around these hideously obscene pictures" is countered by a woman's observation that nudes of women are common but Mapplethorpe is one of the few photographers who celebrates the beauty of the male body. The Museum's director discusses the public debate sparked by the exhibit about issues of racism and homophobia.
- "Fertility Festival" is a *National Geographic*-type anthropological piece presenting images and sounds from the remarkable ancient annual fertility festival in Iuyama, Japan in

which local residents march through city streets with totems shaped like giant penises.

6. Under the new statutory and regulatory scheme as I understand it,

(a) each cable operator is authorized to prohibit leased access programming "which, it reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards," and literally to censor programming identified by programmers as indecent, despite the injunction of 47 U.S.C. § 532(c) that "[a] cable operator shall not exercise any editorial control over any video programming provided" over leased access cable channels;

(b) program providers must identify as "indecent" every leased access program that contains any description or depiction of sexual activity or organs that could be considered "patently offensive" for the average cable subscriber nationwide, and cable operators may further require programmers to certify *all* leased access programming as indecent or not;

(c) any program identified as indecent by the program provider not prohibited outright must be placed on a blocked channel, and viewers will be able to access such programming for themselves or their children only if they send a written request for unblocking, which the cable operator may take up to thirty days to accomplish. Because this will be widely viewed as a "porno list," it will substantially impede access (which may well have been the intent of its sponsors). Any program identified as indecent by cable operators (if they exercise the prescreening power afforded by the Commission and do not prohibit "indecent" programs outright) may be blocked or channelled to "time periods of their choosing"; and

(d) operators have been stripped of their longstanding immunity from prosecution for programming on leased access channels "that involves obscene material," thereby strongly inducing them to censor materials with sexual content.

7. Serious and irremediable harm threatens The 90's Channel (and other access programmers and viewers) if the rules promulgated by the Federal Communications Commission that are the subject of this petition go into effect. As detailed below, the 90's Channel will have to use an extraordinarily encompassing definition of what is or is not indecent because of the drastic consequences that may befall The 90's Channel under the rules

- if it fails to identify as "indecent" any programming that TCI "reasonably believes" *or* that the Commission finds describes or depicts sexual activities "in a patently offensive manner" for the "average subscriber to cable television" in the nation (*see* First Report and Order (hereafter "First Report) ¶ 37), or
- if it certifies any program as not indecent and TCI disagrees with its judgment (assuming that TCI, acting pursuant to the Commission's authorization, requires The 90's Channel to certify to the "indecency" or not of *all* of its programming).

8. The 90's Channel will have to impose strict self-censorship because the consequences of a single error, or a single case of error as perceived by the cable operator, are so great. TCI, lessor to The 90's Channel, expressed the following views in its comments on the FCC in the proceeding concerning implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"):[1]

> If a leased access programmer that has a contract for carriage has certified that its program is not indecent, and breaches that commitment, then the cable operator should have the full range of remedies available, including voiding the contract and discontinuing carriage. Here, again, no new FCC regulations regarding disputes are necessary

---

[1] MM Docket No. 92-256.

> because both parties have the normal ability to pursue their rights under the contract.[2]

In its First Report, the FCC essentially upheld TCI's position, referring to "the wide discretion Congress afforded cable operators under this section," and declining to take any role regarding denial of access under Section 10(a) of the Act.[3]

9. Thus, if TCI (or any cable operator leasing channel capacity) believes — rightly or wrongly — that a breach of certification has occurred through submission of a single putatively indecent program, it can apparently remove *an entire program service permanently*, subject (perhaps) to later judicial action ordering restoration. The prospect of the indefinite, possibly permanent, loss of our entire channel means that in practice we will have to withhold any program which the cable operator might perceive to be indecent.[4]

10. Significantly, the First Report provides for where there are allegations of "under-identification" of indecency, but not where there are allegations of its "over-identification" by operators. The Commission advised that the rules "do not envision disputes arising from the content of programs on the leased access channel *except where a program, not identified by a program provider as indecent, is carried on a non-blocked leased channel, and is alleged to be indecent*." First Report ¶ 75.

11. The basis for The 90's Channel's ability to present its alternative form of programming has been the statutory prohibition of operator censorship and involvement in any way in the content of our programming. The new rules alter that regime by granting operators who are hostile to leased access channels, as I believe TCI to be, the ability to censor any of our programming

---

[2] Comments of TCI at 18-19.

[3] First Report ¶ 31.

[4] In addition to private penalties imposed by cable operators, we are also subject to the imposition of financial penalties by the Commission (see First Report at ¶ 77).

with sexual content outright, knowing that TCI is protected by the "reasonable belief of indecency" standard and the expense of any legal challenge to that censorship or, worse, to terminate our leased access contract because of a certification or identification with which they purport to disagree. Leased access is the only effective outlet DAETC has to reach the hundreds of thousands of viewers that it now reaches. For some time TCI has been attempting to remove The 90's Channel from its systems, and the legislative history shows the general hostility of operators to access programmers. *See generally* DAETC Comments at 3-5, 7-10.

12. The Commission's vague and opaque definition of indecency (or TCI's private definition, from which no appeal may be available) are completely inadequate for programmers like myself to determine whether particular programs are "indecent" within the meaning of the Commission's rules and subject to censorship. I have no idea what "contemporary community standards *for the cable medium*" are, or how to find out. Based on the extent of R- and X-rated material on cable systems throughout the nation (*e.g.* on Time-Warner's "REAL SEX" or THE PLAYBOY CHANNEL or on pay-cable adult services, one could conclude that under those standards material would have to be what is referred to as "hard core pornography" to be "indecent"; but I doubt that Section 10's sponsors had that standard in mind when they persuaded the Senate in less than a day, in an election year, to support their hastily drafted amendment, or that the Commission so believes, Since the Commission deliberately referred to standards "*for the cable medium*," its decisions and rules concerning indecency in the broadcast context do not provide reliable guidance; indeed, the Commission's broadcast indecency policy has been shifting so much in recent years as to give no guidance even in the broadcast context. Moreover, the rules subject our programming in the first instance not to the Commission's view of "indecency" but to TCI's view, so long as some court (apparently a state court, in a breach of contract action) later finds that view "reasonable."

13. Program guides for the systems on which we operate do not typically give viewers more than 30 days advance notice of programming. Even if we assume that operators will not

prohibit "indecent" programming outright but will only block it pursuant to the Commission's rules, the new rules would still effectively preclude access to programs even by viewers who, having seen notice of a program on AIDS education or sex education, seek to obtain it. A subscriber request to unblock need not be honored until the 30th day after it is received, which as a practical matter censors the program even for the viewer who expressly seeks access to the program. First Report ¶ 67. Thus, for the asserted purpose of protecting young people (who could be "protected" if necessary by parentally-controlled lockboxes), the new rules effectively deprive not only children but also adults of much constitutionally protected programming.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 8, 1993.

/s/

JOHN B. SCHWARTZ